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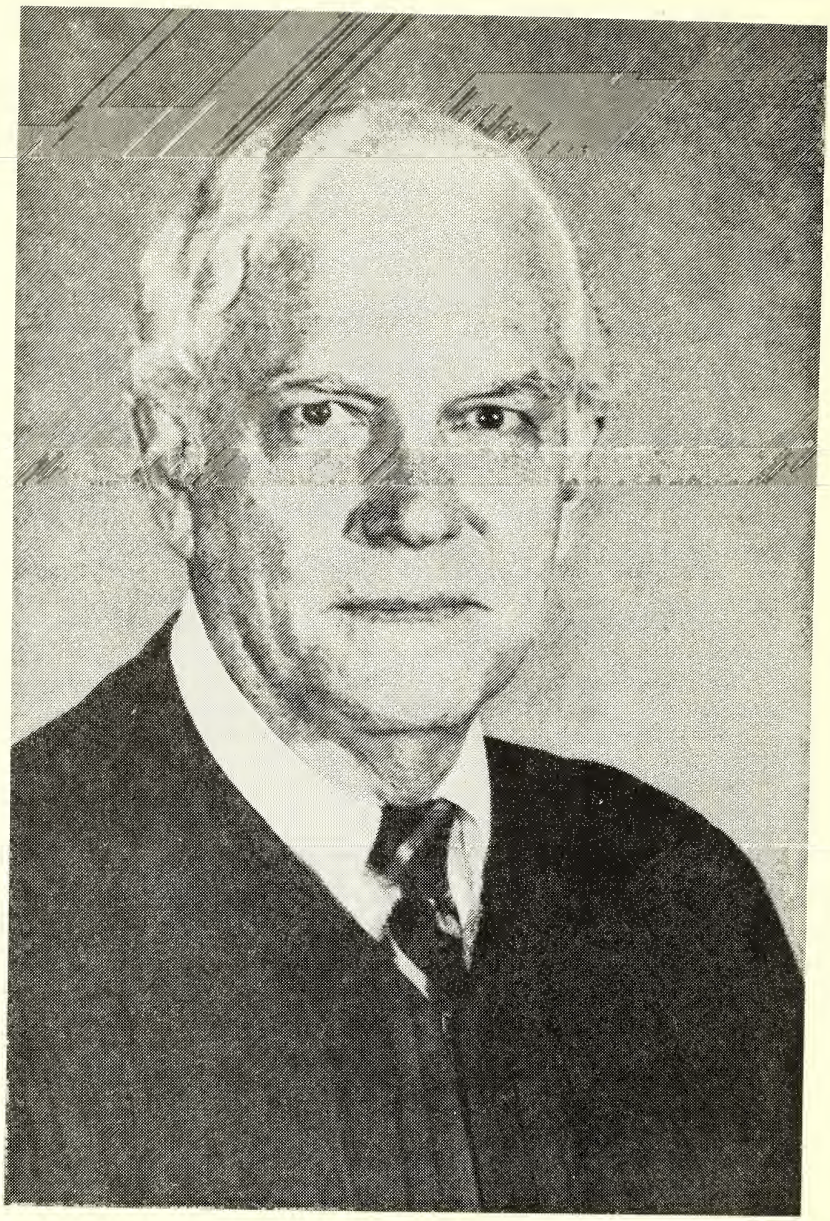

Charles Clark
Chief Judge
United States Court of Appeals
for the Fifth Circuit
1969-1992

FOREWORD

> "If you looked up 'gentleman' in an animated dictionary, you'd see a picture of Charles Clark."[1]

Charles Clark, recently retired Chief Judge of the United States Court of Appeals for the Fifth Circuit, is many things to many people; family man, judicial scholar, leader, and friend.

Chief Judge Clark was born September 12, 1925, in Memphis, Tennessee. He grew up and attended public schools in Cleveland, Mississippi, and continued his education at Millsaps College and Tulane University. He received his LL.B in 1948 from the University of Mississippi School of Law. Chief Judge Clark served on active duty in the United States Naval Reserve during both World War II and the Korean Conflict.

Chief Judge Clark was in private practice in Jackson, Mississippi from 1948-69 and served during the period 1961-69 as Special Assistant to the Attorney General of the State of Mississippi. He was sworn in as Circuit Judge on November 11, 1969, and has been a circuit judge for 22 years and the Chief Judge of the Fifth Circuit since 1981. Also, since 1989 he has been chairman of the powerful executive committee of the Judicial Conference of the United States, which has day-to-day administrative control over the nation's federal court system.

It is with great respect that the *Mississippi Law Journal* honors Chief Judge Clark on the occasion of his retirement from the bench.

William J. Dunaway
Editor in Chief

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[1] Hunter, *Chief 5th Circuit Judge Ending 10-Year Reign; Politz to Succeed Mississippi's Clark on Court Beset by Vacancies*, TEXAS LAWYER, July 15, 1991, at 4 (quoting Louisiana State University law professor Frank Maraist).

CHIEF JUDGE CHARLES CLARK

*Henry A. Politz**

Charles Clark has been the Chief Judge of the Fifth Circuit since the reconstitution of the Fifth Circuit on October 1, 1981. He retires from that position on January 15, 1992. His record of service is not likely to be matched.

One of our colleagues recently noted that Charles Clark looked and acted more like a judge than any person who ever wore judicial robes, state or federal. Having served with him for over twelve years, I echo that observation. Charles Clark has been the epitome of judicial excellence in both physical appearance and performance.

As is not infrequently the case in life, few other than those who have served as federal circuit chief judges can truly comprehend the demands and burdens of that office. Charles Clark's bearing and demeanor never reflected anything other than a quiet, even-handed confidence that all that need be done would be done. Rare is the individual who could handle all of the tasks required of chief judge of a circuit court, maintain a full judicial load on a very busy appellate court and, for good measure, act as chairman of the Executive Committee of the Judicial Conference of the United States. Charles Clark did all three simultaneously.

Most federal court statistical records are maintained on a

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* Native of Napoleonville, Louisiana. B.A., LSU (1958); J.D., LSU Law School (1959). Selected "Outstanding Law Graduate of 1958-59" by members of class; Order of the Coif; O.D.K.; Law Review editorial staff. Named Outstanding Young Lawyer in Louisiana, 1971.

Practiced law with Booth, Lockard, Jack, Pleasant & LeSage, Shreveport, Louisiana, from February 1959 until July 1979. Offices held include: President of Louisiana Trial Lawyers Association; President of Shreveport Bar Association, member and chairman of Professional Responsibility Committee of Louisiana Supreme Court; member of House of Delegates and Board of Governors of the Louisiana State Bar Association; member, Louisiana Judiciary Commission; an assistant Bar Examiner for the Louisiana Supreme Court; member and chairman of the Shreveport Airport Authority. . Visiting professor, LSU Law Center, Baton Rouge; lecturer on Medico-Legal topics at LSU Med School, Shreveport. Presently serving as a member of the Committee on Codes of Conduct of the Judicial Conference of the United States.

Father of eleven children, three of whom are lawyers.

Since July 1979, a judge of the United States Court of Appeals for the Fifth Circuit.

Editor's Note: Judge Politz succeeded Chief Judge Clark as Chief Judge of the United States Court of Appeals for the Fifth Circuit on January 15, 1992.

fiscal year basis beginning July 1. During his twenty-two years on the Fifth Circuit Charles Clark has authored over 2,800 opinions, ranging from a low of four in his first partial year on the bench to a high of 172 in his last full year of service. The raw numbers tell only a part of the story. The quality and consistency of the decision making is the true measure of his contributions which are certain to be recognized for many years to come.

Perhaps one of the greatest compliments that can be paid is the statement that one's life has been enhanced because it has been touched by another. I can say that, with gratitude, about Charles Clark. His presence on the court and in council shall be sorely missed. He leaves a court which frequently has demonstrated its divergence of thought in matters judicial, but which is unanimous and unequivocal in its expression of respect and affection for him. Of him it truly may be said: He did "mind [his] own aim . . . God speed the mark!"[1]

---

[1] Ralph Waldo Emerson to J.W.

A TRIBUTE TO JUDGE CHARLES CLARK

A Law Clerk's Reflections

*Rodney A. Smolla**

The dedication of this issue of the *Mississippi Law Journal* to Chief Judge Charles Clark, marking his retirement from the bench, is a fitting tribute to a great Judge and public servant. I add these few words of affection and respect on behalf of all the many law clerks who have been privileged to serve Judge Clark over the years.

I can say without reservation that my year clerking for Judge Clark was the happiest of my professional life. Never again would I learn so much so fast, never again would I work in a setting so pleasant and collegial. What we clerks learned from Judge Clark was the most valuable lesson we will ever learn as lawyers: what it really means to be a professional, in the highest and best sense.

Judge Clark's grace and gentility are known to all in his professional and personal life. Every clerk who worked for him witnessed how he treated his colleagues, litigants, clerks and staff: with dignity. What I specially admired was his ability to transmit that example to his clerks and staff. We understood that we were to contest issues vigorously, but always with civility and modesty. We learned from Judge Clark how to traverse the contentious landscape of the adversarial system of lawyers and judges with aplomb and humility. These qualities made Judge Clark an effective administrator, an influential jurist, and a powerful role model.

Judge Clark took a warm interest in the lives and careers of the clerks, and one felt one could seek his support and guidance whenever needed. But there was also a healthy respect for privacy in everything the Judge did; we respected his privacy and he respected ours. I saw that what most mattered in his life was his family, and I knew that my family was what he thought

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* Arthur B. Hansen Professor of Law and Director, Institute of Bill of Rights Law, College of William and Mary, Marshall-Wythe School of Law.

should most matter in mine. Quality of life was important to Judge Clark, and in subtle ways he passed that message on to all of us--and for Judge Clark the road to a quality life was based more than anything else on loyalty and affection for loved ones.

Judge Clark also had an abiding sense for the quality of professional life. He worked enormously hard, and managed to get those who served him to work hard, but one never felt that life was frenetic or panicked. There was time for collegiality, for humor, for a relaxing lunch, for a coffee break with anyone in chambers.

One got the message early on that the Judge had no desire to "write for posterity." He was not interested in making headlines with his opinions or in his cases becoming jurisprudential showpieces. As clerks we were to help the Judge craft his opinions thoroughly and professionally, but avoid gratuitous philosophizing, literary excesses, and the announcement of legal propositions broader than necessary.

At the same time, the Judge did not believe in giving litigants short shrift. In all but trivial cases, he wanted to produce an opinion that would give the litigants on both sides a sense that they had received the full consideration their case deserved. A basic explication of the facts, a summary of the arguments presented, and a reasoned explanation of the result were to be included in all cases, great and small. And there was never any doubt as to who was the judge. As clerks we were invited to give Judge Clark our candid assessments and Judge Clark always listened carefully and with an open mind. But when the time came for him to resolve an issue, the resolution was his and his alone.

While Judge Clark's jurisprudence tended to be conservative, his conservatism was never strident or inflexible. He was open-minded in every case, willing to hear out and explore the arguments of each side, and willing to play devil's advocate against the prosecution and the defense. He strived for the "right" result—the result that comported with precedent, logic, and experience as best he could discern them. If he felt the law compelled a result that he did not savor as a matter of personal philosophy or temperament, he would brush aside those personal inclinations and vote for that result ungrudgingly. Although instinctively cautious about making new law, he never flinched from crafting those incremental changes in legal doctrines that are the lifeblood of our legal tradition.

At a time in the history of the profession in which lawyers and laymen alike are tempted to dismiss our judicial system as corrupt and cynical, Judge Clark stood out as immediate and irrefutable evidence that all is not hopeless: Here is a lawyer in a position of power and influence who is compassionate, diligent, honest, and thoroughly professional. Here is a lawyer's lawyer, a judge's judge, a clerk's judge.

One of the most striking surprises for a new clerk working for Judge Clark was the phenomenon of people "off the street" wandering into the chambers seeking help. They might have a grievance against a government agency, or a personal legal problem, and they somehow found their way to Judge Clark's office, thinking he could be of help. The first time I saw such a situation unfolding, I assumed the Judge's secretary would politely shunt the person off, explaining that the Judge and the United States Court of Appeals for the Fifth Circuit just didn't accept "walk in" traffic—that this was a Court that heard appeals, in cases handled by lawyers. It didn't happen that way. Judge Clark could see the stranger from inside his office waiting out in the reception area. He came out and cordially greeted the man, and spent several minutes hearing about his problem. He then gently and thoughtfully explained, in a few minutes, the general nature of the man's legal problem, and carefully explained where he should go for assistance. I will never forget the incident, or its lesson.

And we will never forget our clerkships. Thank you, Judge Clark, from all of us who were privileged to clerk for you. You and your family have our affection, gratitude, admiration, and our very best wishes for the future.

FRAMEWORK FOR AN ENVIRONMENTAL CRIMES ACT IN MISSISSIPPI

*Robert E. Hauberg, Jr.**
*Michael T. Dawkins***

Environmental crimes committed in Mississippi are currently punishable only as misdemeanors in the state courts, regardless of the defendant's culpability or the degree of harm inflicted on the environment. There are, however, increasing public pressures for a safer and cleaner environment, mounting federal prosecutions and adoptions of felony environmental crimes statutes by adjoining states. Inevitably, therefore, the Mississippi Legislature will pass a criminal statute that significantly increases the severity of punishment for violations of environmental laws and regulations.

Pushed by the public's concerns, the zeal with which the federal government has prosecuted and punished environmental crimes has intensified. In its first eight years of existence, the Justice Department's Environmental and Natural Resources Division has obtained over 700 indictments for federal environmental crimes, with convictions in over seventy percent of those cases. One-third of those indictments and convictions occurred since 1987.[1] Congress has equipped prosecutors with several federal environmental statutes containing felony criminal provisions.[2] For example, in the 1990 Amendment to the Clean Air

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* B.A. (summa cum laude), University of Mississippi, 1965; M.A. Yale University, 1967; J.D., Yale Law School, 1970. Mr. Hauberg was formerly an Assistant United States Attorney and a Senior Litigation Counsel, Fraud Section, Criminal Division, U. S. Department of Justice and the Dallas Bank Fraud Task Force. He is a partner with the Jackson, Mississippi law firm of Watkins Ludlam & Stennis.

** B. Accy., University of Mississippi, 1981; J.D., University of Alabama, 1988. Mr. Dawkins is an associate with Watkins Ludlam & Stennis.

[1] 5 Toxics L. Rep. (BNA) 831 (Nov. 28, 1990).

[2] Felony provisions are contained in the Clean Air Act (CAA), 42 U.S.C. § 7413(c)

Act (CAA), Congress upgraded the CAA's misdemeanor provisions to felonies.[3]

Public expectations of enforcement are also changing as a result of this boom of federal investigatory and prosecution activity. Environmental criminals, including senior executives, are being sentenced to serve real prison time. This reality became known to Mississippians in the case of *United States v. Sellers*.[4] In that case, the Fifth Circuit Court of Appeals affirmed a forty-one month prison sentence imposed on a man convicted of dumping sixteen fifty-five gallon drums of paint wastes in Jones County, Mississippi.[5] This new federal assault on environmental violations is also reflected by the imposition of significant individual and corporate fines upon conviction.[6]

Even though the Environmental Protection Agency (EPA), including its Office of Inspector General, and the Federal Bureau of Investigation (FBI) have increased the number of investigators assigned to environmental cases, the Justice Department has requested that states take on more enforcement duties.[7] More environmental cases will likely be referred by the Justice Department to states which have an environmental crimes stat-

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(1990), Federal Water Pollution Control Act or "Clean Water Act" (CWA), 33 U.S.C. § 1319(c) (1990), the Comprehensive Environmental Response, Compensation, & Liability Act or "Superfund law" (CERCLA), 42 U.S.C. § 9603 (1988), the Resource Conservation & Recovery Act (RCRA), 42 U.S.C. § 6928(d) (1988), and the Safe Drinking Water Act (SWDA), 42 U.S.C. § 300h-2 (1988).

[3] *See* 42 U.S.C. § 7413(c) (1990).

[4] 926 F.2d 410 (5th Cir. 1991).

[5] *Sellers*, 926 F.2d at 417-18. The new federal sentencing guidelines mandate that prison sentences be imposed upon conviction for most federal environmental crimes. What was once a subjective process by the sentencing judge has now become an objective mathematical formula. With very few exceptions, judges can no longer impose a sentence and suspend the sentence in favor of probation. *See* Starr & Kelly, *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10,096 (March 1990).

[6] Some of the harshest fines have been levied by courts in cases where guilty pleas were entered by the defendant. *See* United States v. International Paper Co., 6 Toxics L. Rep. (BNA) 279 (July 31, 1991) (D. Me. July 3, 1991) (upon entry of guilty plea, corporate defendant was ordered to pay a $2.2 million fine, third largest RCRA fine in history); United States v. Unichem Int'l Inc., 5 Toxics L. Rep. (BNA) 104 (June 20, 1991) (D. Wyo. May 31, 1990) (previous RCRA record fine of $1.25 million imposed on corporate defendant who pled guilty).

[7] 20 Envtl. L. Rep. (Envtl. L. Inst.) 1714 (Feb. 2, 1990).

ute with "appropriate sanctions" in place.[8]

Mississippi will follow its border states which already have felony statutes in place for environmental crimes. This article explores what types of provisions the Mississippi statute is likely to contain and how the statute will probably be judicially construed. In particular, the likely adoption of federal statutory standards in Mississippi and questions about the key "intent" elements, now left to federal court interpretation, are discussed.

I. State Court Prosecution of Environmental Crimes in Mississippi

The Solid Wastes Disposal Law of 1974 (SWDL)[9] contains Mississippi's only environmental crimes statute.[10] Under the statute, "[a]ny person who knowingly violates" the SWDL or an order issued by the Mississippi Commission on Environmental Quality (the Commission) pursuant to the SWDL is guilty of a misdemeanor.[11]

Since the scope of conduct governed by the SWDL is broad, a wide range of activities may be the basis of criminal liability in Mississippi state courts. The SWDL, enforced by the Commission and the Mississippi Department of Environmental Quality (DEQ),[12] regulates the treatment, disposal,[13] and transporta-

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[8] *Id.* at 1715 (quoting Richard B. Stewart, Assistant Attorney General for the Environmental and Natural Resources Division of the Department of Justice).

[9] Miss. Code Ann. §§ 17-17-1 - 59 (Supp. 1991).

[10] The statute states in pertinent part:

> Any person who knowingly violates any provision of this chapter [the SWDL] or violates any order issued by the commission under the authority of this chapter shall, upon conviction, be guilty of a misdemeanor and shall be subject to a fine of not more than Twenty-five Thousand Dollars ($25,000.00) for each day of violation or to imprisonment not to exceed one (1) year, or both. Each day's violation shall constitute a separate offense.

Miss. Code Ann. § 17-17-29(5) (Supp. 1991).

[11] *Id.* By virtue of Miss. Code Ann. § 21-13-19, a violation of the SWDL within city limits renders the offense a crime against the municipality and is punishable by up to six months of jail time and a fine of up to $1,000.00. Op. Att'y Gen., May 31, 1988 (citing Miss. Code Ann. § 17-17-11 and 17-17-29(5)) (determining that city ordinance requiring trucks hauling non-hazardous waste is preempted by SWDL).

[12] Miss. Code Ann. § 17-17-2 (Supp. 1991).

[13] For example, Miss. Code Ann. § 17-17-7 (Supp. 1991), requires that "garbage" and "rubbish" containing garbage be disposed of by sanitary landfill, incineration, composting, and other means, subject to DEQ approval. Miss. Code Ann. § 17-17-9 (Supp.

tion[14] of non-hazardous wastes.[15]

Through October 1, 1991, only two convictions have been obtained under Mississippi's misdemeanor environmental crimes statute. Both cases were prosecuted in Harrison County. One case involved the owner of a body shop who dumped paint solvents at three coastal locations. In the other case, shrimp hulls were dumped into the local bay. In both cases, the defendants pled guilty and received suspended sentences.[16]

The absence of a felony environmental crimes statute in Mississippi poses two problems. First, environmental crimes investigators and local and state prosecutors lack incentives to pursue environmental crimes investigations because, regardless how egregious the conduct, the crime will only be prosecuted as a misdemeanor. Since Mississippi lacks a significant criminal enforcement option, the federal government has stepped in and virtually preempted environmental crimes prosecutions in Mississippi.

The second and more troubling public policy problem results from the fact that environmental crimes in all four border states may be prosecuted as felonies.[17] Thus, a risk exists that

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1991) restricts the burning of garbage or rubbish containing garbage. "Garbage" and "rubbish" are statutorily defined at MISS. CODE ANN. §§ 17-17-3(K) and (V) (Supp. 1991), respectively.

Under MISS. CODE ANN. § 17-17-27(1) (Supp. 1991), the Commission and DEQ are empowered to regulate the management of solid wastes. Section 17-17-27(4) (Supp. 1991) prohibits the construction, operation or material alteration of a solid waste treatment or disposal facility or site without a state permit.

[14] Vehicles used to transport solid wastes are required to be covered. MISS. CODE ANN. § 17-17-11 (Supp. 1991).

[15] According to MISS. CODE ANN. § 17-17-15(1) (Supp. 1991), the location and means of hazardous waste disposal are regulated by the DEQ. No person may store, treat or dispose of a hazardous waste without a state permit issued pursuant to MISS. CODE ANN. § 17-17-27(4) (Supp. 1991). Owners and operators of commercial hazardous waste management facilities are subject to certain reporting requirements under MISS. CODE ANN. § 17-17-53(1), (3) (Supp. 1991). Hazardous waste generators, transporters, and owners or operators of facilities for the treatment, storage, recycling, or disposal of hazardous wastes are subject to reporting requirements under MISS. CODE ANN. § 17-17-53(5) (Supp. 1991).

[16] Telephone interview with Darrell Pierson, Engineer with the Emergency Services Branch, DEQ (June 20, 1991); Telephone interview with Charles Brown, Investigator, Mississippi Attorney General's Office (June 19, 1991).

[17] In Alabama, crimes involving hazardous wastes are punishable by up to ten years imprisonment and a $50,000.00 fine. Significantly, conviction under this statute yields a

dangerous chemicals and wastes generated out of state will be transported into Mississippi and dumped where the threat of criminal sanctions is considerably lower.

This is exactly what occurred in *United States v. Sellers*.[18] In that case, paint and paint thinner waste was generated by Trident Marine's painting of navy vessels at a dock in Violet, Louisiana. Trident Marine's painting supervisor contacted the defendant, Sellers, to dispose of the paint waste. Although Sellers' hauling business was based in Louisiana, Sellers transported the waste and dumped it in Jones County, Mississippi.[19] The threat of interstate dumping in Mississippi raises significant public policy concerns about the future of the Mississippi environment.

To deal with these policy and enforcement problems, a felony environmental crimes bill was introduced during the 1991 session of the Mississippi Legislature. The "Mississippi Environ-

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minimum term of imprisonment of one year and one day. ALA. CODE § 22-30(19)(e) (1985).

Certain crimes involving water or air pollution or hazardous substances are punishable in Arkansas for up to five years imprisonment and/or a fine of up to $50,000.00. ARK STAT. ANN. § 8-4-103(a) (2); § 8-7-204(a)(2) (Supp. 1991). A person who "purposely, knowingly or recklessly causes pollution of the waters or air of the state in a manner not otherwise permitted by law, and thereby places another person in imminent danger of death or serious bodily injury" will be imprisoned for up to twenty years and/or fined up to $250,000.00. ARK. STAT. ANN. § 8-4-103(a)(3) (Supp. 1991). Knowing endangerment involving hazardous waste is also punishable for up to twenty years imprisonment and/or a $250,000.00 fine. ARK. STAT. ANN. § 8-7-204(a)(4) (Supp. 1991).

Willful violations of Louisiana's hazardous materials transportation law yield minimum and maximum fines of $5,000.00 and $10,000.00 per day of violation, respectively. A minimum prison term is five years for such a violation and the maximum prison term is ten years. 1981 LA. SESS. LAW SERV. § 32:1514 (West). The unlawful, willful, or knowing discharge, emission or disposal of a substance threatening to human health is punishable by up to a $100,000.00 fine per day of violation and/or ten years of imprisonment. 1984 LA. SESS. LAW SERV. 30:2025 (West). Other felony statutes punishing the reckless handling of hazardous materials and knowing endangerment appear at 1984 LA. SESS. LAW SERV. 32:1518 and 30:2183 (West), respectively.

Tennessee categorizes certain environmental crimes as "Class E" felonies. TENN. CODE ANN. § 69-3-115(c) (Supp. 1991). A Class E felony requires minimum and maximum terms of imprisonment of one year and six years, respectively. TENN. CODE ANN. § 40-35-111(b)(5) (Supp. 1990). The maximum fine is $25,000.00. TENN. CODE ANN. § 69-3-115(c) (Supp. 1991).

[18] 926 F.2d 410 (5th Cir. 1991).

[19] *Sellers*, 926 F.2d at 410.

mental Enforcement Act," introduced as Senate Bill 2983,[20] if enacted, would have drastically increased penalties and, presumably, the incentive for environmental crimes investigators and the state attorney general's office to pursue convictions for environmental crimes. Senate Bill 2983 died in committee during the 1991 legislative session, it is expected to be reintroduced during the 1992 session.[21]

Senate Bill 2983 set forth ten types of conduct, the "offense categories," as felonies:

1. Transporting or causing to be transported a "hazardous waste"[22] or "hazardous substance"[23] to a facility lacking a proper federal or state permit.[24]

2. Treating, storing, or disposing of a hazardous waste or hazardous substance (1) without a permit; (2) in violation of a permit; (3) in violation of federal or state law; or (4) with "conscious disregard of a substantial . . . risk that such treatment, storage, or disposal is a gross deviation from the standard of care which a reasonable person would exercise in the situation. . . ."[25]

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[20] S. 2983, 1991 Leg. (Miss.).

[21] *Editor's Note - As this issue went to press, Senate Bill 2046, identical to last year's S. 2983, was introduced in the 1992 Senate.*

[22] "Hazardous waste" is defined by the SDWL in the Mississippi Code as follows:

> "Hazardous wastes" means any waste or combination of waste of a solid, liquid, contained gaseous, or semisolid form which because of its quantity, concentration or physical, chemical or infectious characteristics, may (i) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or (ii) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed which are listed by the Environmental Protection Agency as hazardous waste. Such wastes include, but are not limited to, those wastes which are toxic, corrosive, flammable, irritants, strong sensitizers, or which generate pressure through decomposition, heat or other means. Such wastes do not include those radioactive materials regulated pursuant to the Mississippi Radiation Protection Law of 1976, appearing in Section 45-14-1 et seq.

MISS. CODE ANN. § 17-17-3(1) (Supp. 1991).

[23] S. 2983, 1991 Leg. § 2(1)(9) (Miss.). Section 2(1)(a) incorporates the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) definition of a "hazardous substance" at 42 U.S.C. § 9601(14) (1988).

[24] S. 2983, 1991 Leg. §§ 2(1)(a), 3(1)(a) (Miss.).

[25] *Id.* §§ 2(1)(b), 3(1)(b). This provision, as drafted, criminalizes treatment, storage or disposal that is authorized by a valid permit and yet grossly deviates from a reasonable person's standard of care.

3. Omitting material information or making a false statement in an application, label, manifest, record, report, permit or other document filed, maintained or used pursuant to federal or state law.[26]

4. Destroying, altering, concealing, or failing to file a record, application, manifest, report, or other document required under federal or state law, when the person has generated, stored, treated, transported, disposed of, exported, or otherwise handled a hazardous waste, hazardous substance, or used oil.[27]

5. Transporting or causing to be transported a hazardous substance or used oil where the transporter lacks a manifest or permit required under federal or state law.[28]

6. Storing, treating, transporting, disposing or otherwise handling a used oil either (1) in violation of a material condition or requirement of a permit or (2) in violation of law.[29]

7. Resisting, impeding, or interfering with a "state agency regulatory authority of environmental or health related matters"[30] or a law enforcement officer[31] in the performance of their duties.[32]

8. Submitting materially false information or making materially false statements to a representative of "any state agency with regulatory authority of environmental or health related matters" or to law enforcement officers.[33]

9. Tampering with, destroying, or damaging a well or other device installed by direction of the DEQ or other state agency to test groundwater contamination.[34]

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[26] *Id.* §§ 2(1)(c), 3(1)(c).

[27] *Id.* §§ 2(1)(d), 3(1)(d).

[28] *Id.* §§ 2(1)(e), 3(1)(e).

[29] *Id.* §§ 2(1)(f), 3(1)(f).

[30] This phrase is used several times in Senate Bill 2983 to refer to state agencies including, but not limited to, the DEQ, the Department of Health and the Department of Agriculture and Commerce. *See, e.g.*, § 2(1)(g).

[31] "Law enforcement officers" are referred to throughout the bill as "including but not limited to authorized agents of the Department of Public Safety, Department of Wildlife, Fisheries and Parks, Attorney General, sheriffs, deputy sheriffs, constables, conservation officers and police. . . ." *See, e.g.*, § 2(1)(g).

[32] S. 2983, 1991 Leg., §§ 2(1)(g), 3(1)(g) (Miss.). This provision is very broad and is not expressly restricted to interference with environmental crimes investigations.

[33] *Id.* §§ 2(1)(h), 3(1)(h).

[34] *Id.* §§ 2(1)(i), 3(1)(i).

10. Disposing of a hazardous waste or hazardous substance at a landfill "which cannot be located, designed, constructed and operated" to prevent (1) the endangerment of underground drinking water sources beyond the facility boundary; (2) endangerment of a sole source aquifer; or (3) "contamination by discharge" in violation of federal or state law.[35]

If these crimes are committed "knowingly or with reckless disregard," conviction would yield a minimum prison sentence of two years and a maximum sentence of five years. Conviction on one of these felony charges also bears a minimum fine of $2,500.00 and a maximum fine of $250,000.00 for each day of violation. By contrast, where any of these ten requisite acts are committed negligently, the crime is deemed only a misdemeanor. However, conviction on the misdemeanor charge requires a minimum sentence of three months and a minimum fine of $1,000.00 for each day of violation. The maximum imprisonment and fine for the misdemeanor are one year and $150,000.00, respectively.[36] In both felony and misdemeanor cases, the violator must repay the costs of their prosecution.[37]

Senate Bill 2983 contains even stiffer punishment for a person who, while handling a hazardous waste or hazardous substance, "knows or should reasonably have known at that time that he places another person in imminent danger of death or serious bodily injury. . . ."[38] This is commonly referred to as a "knowing endangerment" provision. Under this provision, imprisonment would range from a minimum of four years to a maximum of fifteen years and fines from a minimum of $5,000.00 per day to a maximum of $250,000.00 per day.[39]

The bill also imposes corporate criminal liability. An "organization" could be prosecuted under the proposed Act when an agent or employee of the organization performs conduct under offense categories 1 or 2 either (a) while acting within the scope of his agency or employment or (b) when the act is "au-

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[35] *Id.* §§ 2(1)(j), 3(1)(j).

[36] *Id.* §§ 3(1).

[37] *Id.* § 2(1).

[38] *Id.* § 2(2).

[39] *Id.* § 2(2). Organizations convicted under the knowing endangerment provision are subject to a maximum fine of $1 million. *Id.*

thorized, requested, commanded, performed or recklessly tolerated" by the organization.[40]

The bill directs all state and local law enforcement officers to enforce the Act.[41] Law enforcement and state agency personnel are required to file a report with the Attorney General's office within one day of receiving information concerning a violation of the Act.[42] Criminal cases may be initiated by the DEQ or Attorney General and prosecuted by the Attorney General.[43]

Fines collected under the Act would be applied as follows: One-sixth to an informant whose information led to an arrest and conviction; one-sixth to the county where the violation occurred; one-sixth to the Pollution Emergency Fund;[44] two-sixths to the Attorney General's office for use in enforcing the Act; and one-sixth to the State General Fund.[45]

II. State Prosecution of Environmental Crimes in Mississippi: The Legacy of Federal Environmental Prosecutions

While the chance that Senate Bill 2983, as reintroduced, will pass is unknown, Mississippi will probably adopt a felony statute of some type within the next few years. Mississippi's environmental crimes statute will punish many of the same types of acts and omissions criminalized under the various federal environmental acts. Two decades of litigation under these federal statutes reveal the types of environmental crimes most often prosecuted. Of the six federal environmental acts, most prosecu-

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[40] *Id.* §§ 2(3), 3(3).

[41] *Id.* § 4(1).

[42] *Id.* § 4(2).

[43] *Id.* § 5(1). The Attorney General is presently authorized to conduct "white-collar crime investigations" and carry out a prosecution of those matters. Ray, *Constitutional and Statutory Authority of the Attorney General to Prosecute Actions*, 59 Miss. L.J. 165, 175 n.58 (1989) (citing Miss. Code Ann. §§ 7-5-59(2), 7-5-54(1) (Supp. 1989)).

Arguably, the Attorney General's power to prosecute environmental crimes existed at common law. *Id.* at 172 n.46 (citing *Moore v. Marsh*, 710 F.Supp. 1488, 1491 (S.D. Miss. 1989)) (Attorney General sued United States Army Corps of Engineers for environmental violations).

[44] Miss. Code Ann. § 49-17-68 (Supp. 1991). This fund was established to be used for pollution mitigation, abatement, cleanup, and remediation.

[45] S. Bill 2983, 1991 Leg., § 6 (Miss.).

tions have occurred under three: (1) the Resource Conservation and Recovery Act (RCRA)[46]; (2) the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or "Superfund"[47]; and (3) the Federal Water Pollution Control Act or "Clean Water Act" (CWA).[48] Prosecutions under these three acts are examined below.

A. Resource Conservation & Recovery Act (RCRA) - Illegal Storage, Transportation and Dumping of Hazardous Waste

RCRA governs the storage, transportation, treatment and disposal of "hazardous wastes."[49] Pursuant to RCRA, a system of permits, manifests, and other documentation practices have been established to insure that hazardous waste is managed to avoid threats to human health or the environment.[50]

Mississippi's environmental crimes statute will probably punish violations of this federal system of permits and manifests as well as violations of Mississippi's hazardous waste management program. Senate Bill 2983, as drafted, criminalizes RCRA violations in offense categories one through six.

42 U.S.C. § 6928(d)[51] criminalizes certain violations of

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[46] 42 U.S.C. §§ 6901-92k (1988).

[47] 42 U.S.C. §§ 9601-75 (1988).

[48] 33 U.S.C. §§ 1251-1387 (1988).

[49] 42 U.S.C. § 6901 (1988). The term "hazardous waste" is defined by RCRA at 42 U.S.C. § 6903(5) (1988).

[50] *See* 42 U.S.C. § 6902(4),(5) (1988) (setting out objectives of RCRA's hazardous waste management system).

[51] 42 U.S.C. § 6901-92K (1988). Section 6928 of RCRA provides, in pertinent part:

> (d) Any person who—
>
> (1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subtitle to a facility which does not have a permit under this subtitle, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 STAT. 1052),
>
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subtitle—
>
> (A) without a permit under this subtitle or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 STAT. 1052); or
>
> (B) in knowing violation of any material condition or requirement of such permit; or
>
> (C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

RCRA's regulations. Specifically, section 6928(d)(1) holds an entity or individual[52] criminally liable for knowingly transporting,

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(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subtitle;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subtitle (whether such activity took place before or takes place after the date of the enactment of this paragraph) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subtitle;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subtitle required by regulations promulgated under this subtitle (or by a State in the case of a State program authorized under this subtitle) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subtitle (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under subtitle C of the Solid Waste Disposal Act—

(A) in knowing violation of any material condition or requirement of a permit under this subtitle C; or

(B) in knowing violation of any material condition or requirement of any applicable regulations or standards under this Act;

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

42 U.S.C. § 6928(d) (1988 & Supp. 1991).

[52] *Id.* According to section 6928(d), a "person" may be held criminally liable. A "person" may be "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 6903(15) (1988).

or causing to be transported, a hazardous waste to a location that lacks an appropriate[53] RCRA permit.[54] RCRA's permitting system was established[55] to assure that wastes are only disposed of at properly equipped facilities.[56] Defendants under this section may be generators[57] or transporters of hazardous wastes.[58]

Conceptually, potential criminal exposure exists in two general areas: First, criminal exposure may arise where individuals or entities improperly handle and dispose of hazardous wastes or fail to maintain proper records. Secondly, such exposure may exist where a person who knowingly treats, stores or disposes of a hazardous waste without a permit or in violation of a permit becomes criminally liable under section 6928(d)(2). Defendants in RCRA cases range from the traditional midnight dumper[59] to the corporate officer who tacitly approves unpermitted storage or disposal.[60]

This definition raises certain sovereign immunity questions. For example, in United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991), defendants appealed their convictions under RCRA on grounds that, as government employees, they were immune from criminal liability. *Id.* at 744. The court, noting that section 6903(15) includes an "individual" as a "person," concluded that "sovereign immunity does not attach to individual government employees so as to immunize them from prosecution for their criminal acts." *Id.*

[53] Criminal liability is not avoided by shipping the hazardous waste to any facility with a RCRA permit. The receiving site must have a permit to receive that particular type of hazardous waste. United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 46 (1st Cir. 1991).

[54] 42 U.S.C. § 6928(d)(1) (Supp. 1991).

[55] Regulations for the treatment, storage, and disposal of hazardous wastes were promulgated by the EPA pursuant to the Congressional mandate of 42 U.S.C. § 6925 (1988).

[56] *MacDonald*, 933 F.2d at 46.

[57] In United States v. Hayes Int'l Corp., 786 F.2d 1499, 1500 (11th Cir. 1986), the conviction of a corporate employee hired by a company to remove wastes from his employer's plant was affirmed. The company lacked a permit for its disposal facility. *Id.*

[58] *See, e.g.*, *MacDonald*, 933 F.2d at 47 (stating that section 6928(d)(1) recognizes no distinction among generators and transporters; both categories of defendants are prohibited from engaging in or arranging for disposal at facility lacking proper permit).

[59] *See* United States v. Sellers, 926 F.2d 410, 412 (5th Cir. 1991) (defendant unloaded 55-gallon drums of paint solvent along creekbank).

[60] *See* United States v. Hoflin, 880 F.2d 1033, 1034-36 (9th Cir. 1989) (defendant was city's director of public works, who instructed city employee to haul paint drums to city sewage treatment plant and bury them; city lacked disposal permit for paint), *cert. denied*, 110 S.Ct. 1143 (1990); United States v. Greer, 850 F.2d 1447, 1451 (11th Cir.

The transportation of hazardous wastes without a manifest is likewise a criminal act under section 6928(d)(5).[61] The international exportation of hazardous wastes without the permission of the receiving nation is criminalized under section 6928(d)(6).[62]

Violation of RCRA documentation requirements can also lead to prosecution under section 6928(d)(3) or (4). Under paragraph (d)(3), a person is criminally liable for knowingly omitting material information or making a false material statement[63] or representation in documenting compliance with the RCRA regulations. Further, paragraph (d)(4) criminalizes the destruction, alteration, concealment or failure to file paperwork mandated under RCRA.

RCRA's knowing endangerment provision covers anyone "who knowingly transports, treats, stores, disposes of, or exports" a hazardous waste or used oil "who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury."[64] Violations by individuals carry

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1988) (defendant was operator of waste recycling business; told by employee that he had nowhere to put certain drums of waste, defendant instructed employee to "handle it"; employee dumped the drums' contents on ground); United States v. Laughlin, 768 F. Supp. 957, 959 (N.D.N.Y. 1991) (corporate president and supervisor of creosote treatment plant were convicted for knowingly storing and disposing of hazardous wastes without permit).

[61] United States v. Jude, 914 F.2d 249 (4th Cir. 1990).

[62] 42 U.S.C. § 6928(d)(6) (Supp. 1991). The first RCRA conviction for the illegal exportation of hazardous wastes occurred in United States v. Franco, 6 Toxics L. Rep. (BNA) 66 (June 12, 1991) (C.D. Cal. May 23, 1991). The defendant pled guilty to illegally transporting fifty 55-gallon drums of hazardous paint and solvent wastes from California to Tiajuana, Mexico.

[63] *See* United States v. International Paper Co., 6 Toxics L. Rep. (BNA) 279 (July 31, 1991) (D. Me. July 3, 1991) (corporate defendant pled guilty to two counts of knowingly making false material statements to federal and state environmental authorities concerning environmental practices at its paper mill; $2.2 million fine imposed was third largest fine ever levied under RCRA).

[64] 42 U.S.C. § 6928(f)(6) (Supp. 1991). "Serious bodily injury" is defined by RCRA for application under the knowing endangerment clause as follows:

> The term "serious bodily injury" means—
> (A) bodily injury which involves a substantial risk of death;
> (B) unconsciousness;
> (C) extreme physical pain;
> (D) protracted and obvious disfigurement; or
> (E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

42 U.S.C. § 6928(f)(6) (Supp. 1991).

a maximum fine of $250,000.00. However, the maximum fine for a non-individual is $1 million.[65] One of the first convictions under the knowing endangerment clause occurred in *United States v. Tumin*,[66] where the violators abandoned three drums of ethyl ether in a residential area and received a two-year sentence. In *United States v. Protex Industries, Inc.*,[67] a corporate defendant was convicted of operating a recycling facility that purchased and used 55-gallon drums formerly containing toxic chemicals. Because of grossly inadequate working conditions, plant employees were exposed to the risk of solvent poisoning and cancer.[68]

B. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) - Illegal Discharge of Pollutants and Failure to Report

CERCLA establishes a notification procedure to be followed when there has been a "release"[69] of a "hazardous substance."[70] The failure to report releases of hazardous substances[71] has been criminalized because adherence to CERCLA's reporting requirements is intended to "ensure that the government, once timely notified, will be able to move quickly to check the spread of a hazardous release."[72]

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[65] 42 U.S.C. § 6928(e) (1986).

[66] 19 Envtl. Rep. (BNA) 1252 (Oct. 28, 1988) (E.D.N.Y. Oct. 11, 1988); *see* Nittoly, *Current Trends in the Prosecution of Environmental Offenses*, 5 Toxics L. Rep. (BNA) 161, 162-63 (July 4, 1990).

[67] 874 F.2d 740 (10th Cir. 1989).

[68] *Protex Indus.*, 874 F.2d at 746. The solvent poison was known to cause serious cognitive, behavioral, personality and sleeping disorders. *Id.*

[69] 42 U.S.C. § 9601(22) (1988) (Supp. 1991). Generally, a "release" under CERCLA is the "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaking, dumping or disposing into the environment. . . ." *Id.*

[70] "Hazardous substance" is defined at 42 U.S.C. § 9601(14) and includes substances listed at 40 C.F.R. pt. 261 or meeting specific toxicity requirements set out in 40 C.F.R. pt. 261.

[71] CERCLA requires the person in charge of the facility to report the release to the National Response Center, the state emergency commission, and the local emergency planning committee if, over a 24-hour period, the release equals or exceeds reportable quantity levels set by the EPA. 40 C.F.R. §§ 302, 355; 54 Fed. Reg. 33418, 33426.

[72] United States v. Carr, 880 F.2d 1550, 1552 (2d Cir. 1989). CERCLA's notice requirements were modeled after the Clean Water Act's (CWA) spill response program [33 U.S.C. § 1321(b)(5)]. *Carr*, 880 F.2d at 1553. " 'The eight years of experience with the

Most CERCLA prosecutions are advanced under 42 U.S.C. § 9603(b)(3).[73] Under this statute, any person "in charge"[74] of a "facility" from which a "hazardous substance" has been released who fails to notify proper authorities "as soon as he has knowledge of such release" is subject to a fine and imprisonment for up to three years. Federally permitted releases are exempt as well as releases which are below "reportable levels." If the defendant reported the release but includes in the report "any information which he knows to be false or misleading," he is subject to the same criminal penalties.[75]

Short-circuiting these requirements removes the safety net of quick governmental responses. Unreported substance releases resulting in criminal prosecution have occurred in widely different situations including spills,[76] purposeful dumping[77] and dis-

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spill response program established by § 311 of the CWA [33 U.S.C. § 1321] simply demonstrate the necessity of immediate notice if an emergency response program is to be effective in protecting public health, welfare and the environment'." *Id.* at 1553 (quoting Sen. J. Randolph, 126 Cong. Rec. 30, 933 (1980)).

[73] This statute provides, in pertinent part:

> Any person who [is]-
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> . . .
>
> (3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to section 9602 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

42 U.S.C. § 9603(b)(3) (1986) (Supp. 1991).

[74] *Id.* Although the phrase "in charge" is not defined by CERCLA, its meaning has been developed judicially. *Id.*

[75] *Id.*

[76] *See* United States v. Baytank (Houston), Inc., 934 F.2d 599 (5th Cir. 1991) (failure to report spill); United States v. High, 20 Envt'l Rep. (BNA) 336 (June 9, 1989) (W.D. Wash. May 19, 1989) (manager of facility was convicted for failing to notify authorities properly of chemical spill).

[77] *See, e.g., Carr*, 880 F.2d at 1550 (defendant, supervisor of maintenance at Army base, directed work crew to dispose of waste cans, but he failed to report release of hazardous substances (paint) from cans); United States v. Greer, 850 F.2d 1447 (11th Cir. 1988) (operator of waste recycling facility failed to report purposeful pouring of barrel

posal at a site lacking a proper RCRA disposal permit.[78]

In a representative case, prosecutors obtained a guilty plea in *United States v. Bogas*.[79] In that case, the defendant admitted that he failed to report the release and, later, during an EPA investigation, made a false statement concerning the release. The defendant, an airport commissioner, initiated a cleanup program at the airport. Workers disposed of drums containing paint, solvents and jet fuel additives in a pit. Although the defendant denied ordering the use of the pit, the evidence revealed that once he learned of the improper disposal, he misrepresented to EPA investigators the number of drums in the pit.[80] Thus, appropriate governmental response was adversely affected by the airport commissioner's cover-up of the full extent of the problem.

C. Clean Water Act - Illegal Discharges of Pollutants and Failure to File Discharge Monitoring Reports

Implementation of the Clean Water Act (CWA) centers around the National Pollutant Discharge Elimination System (NPDES), which prohibits the discharge of pollutants from a "point source"[81] unless the discharge complies with a permit issued by the EPA or a state.[82] The EPA reviews compliance with NPDES permits through monthly discharge monitoring reports filed by the permittee.[83]

Most criminal prosecutions under the CWA arise from ei-

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contents onto ground).

[78] *See, e.g.*, United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991) (Toluene-contaminated soil was disposed at facility lacking RCRA permit for disposal of solid hazardous wastes).

[79] 920 F.2d 363 (6th Cir. 1990).

[80] *Bogas*, 920 F.2d at 365. Apparently, the misrepresentations during the cover-up could have been prosecuted under 42 U.S.C. § 9603(b)(3). *Id.* at 366. They were, however, instead prosecuted under 18 U.S.C. § 1001, the general statute barring false statements to a government agency. *Id.*

[81] 33 U.S.C. § 1362(14) (1988 & Supp. 1991). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.*

[82] *See* 33 U.S.C. §§ 1311(a) (1988).

[83] *See* 33 U.S.C. § 1342 (1987 & Supp. 1991); 40 C.F.R. § 122 (1990).

ther the discharge of pollutants without a permit or in violation of the terms of a permit,[84] industrial discharges in violation of pretreatment standards promulgated under the CWA[85] and noncompliance with CWA's monitoring and inspection requirements.[86] Criminal jurisdiction is very broad in this area. Even if the EPA has yet to promulgate effluent limitations for discharges from a particular type of business, the business is required to have an interim section 1342(a) permit to control operating conditions until such regulations are promulgated.[87]

The CWA's criminal provision, contained in section 1319(c), categorizes offenses in three ways: (1) "negligent violations";[88]

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[84] 33 U.S.C. § 1317 (1987 & Supp. 1991). These discharges are unlawful under 33 U.S.C. § 1311. *Id.*

[85] 33 U.S.C. § 1319 (Supp. 1991). These discharges are unlawful under 33 U.S.C. § 1317. *Id.*

[86] 33 U.S.C. § 1318 (1987 & Supp. 1991). Inspection and monitoring requirements are established pursuant to 33 U.S.C. § 1318. *Id.*

[87] United States v. Frezzo Bros., 602 F.2d 1123, 1127-28 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). In *Frezzo*, the defendants, employees of a mushroom farming business, appealed their convictions on the grounds that plant discharges violated no CWA regulations since no such regulations had been issued relating to their type of business. The Third Circuit rejected this defense.

> We see nothing impermissible with allowing the Government to enforce the Act by invoking § 1311(a), even if no effluent limitations have been promulgated for the particular business charged with polluting. Without this flexibility, numerous industries not yet considered as serious threats to the environment may escape administrative, civil or criminal sanctions merely because EPA has not established effluent limitations. Thus, dangerous pollutants could be continually injected into the water solely because the administrative process has not yet had opportunity to fix specific effluent limitations. Such a result would be inconsistent with the policy of the Act.

Id. at 1128.

[88] 33 U.S.C. § 1319(c)(1) (Supp. 1991). This provides, in pertinent part:

> Any person who-
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> (A) negligently violates section 301, 302, 306, 307, 308, 311(b)(3), 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or
>
> (B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any ef-

(2) "knowing violations";[89] and (3) "knowing endangerment."[90] A negligent violation is a misdemeanor, with a maximum

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fluent limitation or condition in any permit issued to the treatment works under section 402 of this Act by the Administrator or a State;
shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

33 U.S.C. § 1318(c)(1) (Supp. 1991).

[89] 33 U.S.C. § 1319(c)(2) (Supp. 1991). This statute provides, in pertinent part:

Any person who-

(A) knowingly violates section 301, 302, 306, 307, 308, 311(b)(3), 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402(b)(8) of this Act or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 402 of this Act by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

33 U.S.C. § 1319(c)(2) (Supp. 1991).

[90] 33 U.S.C. § 1319(c)(3)(A) (Supp. 1991). This statute provides in pertinent part:

-Any person who knowingly violates section 301, 302, 303, 306, 307, 308, 311(b)(3), 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or in a permit issued under section 404 of this Act by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

33 U.S.C. § 1319(c)(3)(A) (Supp. 1991).

fine of $25,000.00 per day of violation and maximum imprisonment of one year.[91] Prosecutions for negligent violations have generally arisen from discharges of pollutants without a permit.[92]

Knowing violations are felonies, punishable by a maximum fine of $50,000.00 per day of violation and imprisonment of a maximum of three years.[93] Successful prosecutions have occurred in cases of purposeful filling of wetlands,[94] violations of CWA discharge pretreatment standards,[95] and generally unpermitted knowing discharges.[96] Although many of these cases were prosecuted on direct evidence of willfulness,[97] a "knowing violation" may be proven by purely circumstantial evidence.[98] "[T]he

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[91] 33 U.S.C. § 1319(c)(1)(B) (Supp. 1991).

[92] *See, e.g.*, United States v. High, 20 Envt'l Rep. (BNA) 336 (June 9, 1989) (W.D. Wash. May 19, 1989) (manager of facility was convicted for negligent discharge of chemicals); United States v. Ashland Oil Inc., 705 F.Supp. 270, 271, 276 (W.D. Pa. 1989) (corporate defendant was indicted for negligently discharging pollutants when oil spill from storage tank occurred).

[93] 33 U.S.C. § 1319(c)(2)(B) (Supp. 1991).

[94] *See, e.g.*, United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989) (corporation and its vice-president pled guilty to filling wetlands without permit in preparing site for shopping mall); United States v. Pozsgai, 757 F.Supp. 21, 22 (E.D. Pa. 1991) (defendant, owner of truck repair business, was convicted for filling wetlands in preparing 14-acre expansion of his business).

[95] *See, e.g.*, United States v. Rutana, 932 F.2d 1155, 1160 (6th Cir. 1991) (part owner and CEO of metal finishing business was convicted of knowingly discharging, or causing to be discharged, acidic pollutants into city sewer line in violation of national pretreatment standards), *cert. denied*, 60 U.S.L.W. 3108 (Oct. 15, 1991); United States v. Bolt, 929 F.2d 35, 42 (1st Cir. 1991) (management employee of circuit board manufacturer was convicted of aiding and abetting discharge into city sewer of industrial wastewater with high concentrations of toxic metals in violation of pretreatment standards).

[96] *See, e.g.*, United States v. Frezzo, 602 F.2d 1123 (3d Cir. 1979) (corporation, mushroom farming business, and employees were convicted of allowing water runoff from composting system to discharge into creek); United States v. Villegas, 5 Toxics L. Rep. (BNA) 1177 (Feb. 20, 1991) (E.D.N.Y. Jan. 31, 1991) (vice president of lab was convicted of dumping and directing employees to dump human blood and other medical waste into Hudson River).

[97] *See Marathon*, 867 F.2d at 97 (Army Corps of Engineers, which has authority to grant permits for filling of wetlands, had advised defendants that they could not deposit dredged material without obtaining permit; defendants proceeded to bulldoze five acres of wetlands); *Pozsqai*, 757 F.Supp. at 21-22 (before defendant purchased property, he was advised by Army Corps of Engineers that tract qualified as "wetlands"; defendant proceeded to fill wetlands despite additional warnings by Corps and EPA).

[98] *See Frezzo*, 602 F.2d at 1129(*Frezzo* was pre-1987 CWA amendment "negligent or willful" violation case; however, case was prosecuted as purposeful violation case).

Government [does] not have to present evidence of someone turning on a valve or diverting wastes in order to establish a willful violation of [section 1311(a) and section 1319(c)]."[99]

Managerial cost-benefit decisions do not constitute a defense. In one knowing violation case, *United States v. Bolt*,[100] the defendant raised the defense of economic necessity. According to the defendant, a management employee, waste water was allowed to bypass the overworked treatment system because the only alternative was to shutdown plant operations.[101] On appeal of his conviction, the employee claimed that the jury was improperly instructed that, even if the only way to avoid the unpretreated discharge was to shut the plant down and go out of business, the defendant was not excused from violating the law. The First Circuit, sustaining this jury instruction, concluded that the CWA does not recognize a defense of business or economic necessity.

The CWA's knowing endangerment provision[102] contains a mens rea clause identical to the one in RCRA's knowing endangerment provision. Fines for individual defendants cannot exceed $250,000.00 and maximum prison sentences are fifteen years. A corporate fine can reach $1 million.[103] Prosecutors obtained the first CWA knowing endangerment conviction in *United States v. Borowksi*.[104] The defendant, the owner of a metal plating company, ordered employees to dump waste water into the sewer system using plastic buckets, which caused injuries to the employees. The waste water contained toxic levels of nickel, nitric acid, and nitrogen dioxide.[105] However, employee

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[99] United States v. Brittain, 931 F.2d 1413, 1420 (10th Cir. 1991) (quoting *Frezzo*, 602 F.2d at 1129).

[100] 929 F.2d 34 (1st Cir. 1991).

[101] *Bolt*, 929 F.2d at 41.

[102] 33 U.S.C. § 1319(c)(3) (Supp. 1991).

[103] *Compare id.* ("any person who knowingly violates [specified sections of the CWA] and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury . . . .") *with* 42 U.S.C. § 6928(e) (1988) (any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste or who knew at that time of serious bodily danger committed knowing endangerment).

[104] 5 Toxics L.Rep. (BNA) 770 (Nov. 14, 1990) (D. Mass. May 23, 1990).

[105] *Borowski*, 5 Toxic L. Rep. 770. The sentence against the corporation included an order to pay a lump sum to cover insurance premiums for comprehensive medical cover-

consent can be a defense if the employee exercised informed consent in allowing himself to be exposed to the risks.[106]

The CWA also criminalizes the making of a false material statement in documents prepared pursuant to the Act.[107] Tampering with monitoring devices is criminalized under the same provision.[108] Both categories of offenses are punishable by a fine of up to $20,000.00 and/or imprisonment of up to two years.[109]

III. The Lowered Mens Rea Requirement: The Responsible Corporate Officer and Respondeat Superior Doctrines

Mississippi's forthcoming environmental crimes statute must either expressly deal with several mens rea issues or subject the resolution of these issues to judicial interpretation. Such issues may include, for example: (1) Must the prosecution prove that the defendant knew his actions were illegal?; (2) Will a defendant be presumed to have the requisite guilty knowledge because he was a "responsible corporate officer"?; (3) Is the defendant absolved of criminal liability because he, in good faith, believed the proper permits, manifests, and other documents were in place?; and (4) Should the collective knowledge of employees be attributed to a corporate defendant? These and other mens rea questions have been heavily litigated under the federal environmental crimes statutes.

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age for the two employees exposed to the chemicals. *Id.*

[106] *See* 33 U.S.C. § 1319(c)(3)(B)(ii) (Supp. 1991).

[107] 33 U.S.C. § 1319(c)(4) (Supp. 1991).

[108] *Id.*

[109] *Id.* Falsification of CWA monthly monitoring reports has also been prosecuted under 18 U.S.C. § 1001, which criminalizes the knowing and willful making of a false statement concerning a material fact that is within a federal agency's jurisdiction; *see* United States v. Brittain, 931 F.2d 1413, 1414-17 (10th Cir. 1991) (defendant was public utilities director for city; he supervised operations of city wastewater treatment plant and was responsible for filing plant's monthly discharge monitoring reports; he instructed the plant supervisor to falsify the reports). Prosecutions' use of the felony false statements statute also gets around the limitations in the Toxic Substances Control Act (TOSCA), 15 U.S.C. § 2615(b), and those limitations in the Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §§ 2641-55 (which applies § 2615(b)). Both acts make false reports only a misdemeanor.

A. *The Mens Rea Requirement in RCRA*

The requisite mens rea requirement in RCRA criminal cases is particularly troublesome since Congress purposely avoided a statutory definition of "knowingly" and left it for judicial determination.[110] As a starting point, courts have agreed that the prosecution is not required to prove that the defendant knew his actions were illegal or violative of RCRA regulations.[111] This principle is founded, in part, on the reasoning of the United States Supreme Court in *United States v. International Minerals & Chemical Corp.*[112] In that case, the defendant was charged with "knowingly" violating an Interstate Commerce Commission regulation when he shipped sulfuric acid and hydrofluosilicic acid in interstate commerce with incomplete shipping papers. The Court concluded that "[t]he principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation."[113] This conclusion is also premised on the assumption that one who deals in dangerous materials should expect that his handling of those materials is regulated.[114]

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[110] *See* United States v. Hayes Int'l Corp., 786 F.2d 1499, 1502 (11th Cir. 1986) (stating that legislative history indicates Congress intentionally left this issue for courts); United States v. Laughlin, 768 F. Supp. 957, 961 (N.D.N.Y. 1991) (citing H.R. Conf. Rep. No. 96-1444, 96th Cong., 2d Sess. 29, *reprinted in* 1989 U.S. Code Cong. & Admin. News 5038).

[111] *See* United States v. Baytank (Houston), Inc., 934 F.2d 599, 613 (5th Cir. 1991); United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991). In *Dee*, the defendants claimed that they did not "knowingly" commit RCRA crimes since they were unaware that a violation of RCRA constituted a crime. The court affirmed the convictions by relying on a line of Supreme Court cases involving the regulation of dangerous materials, holding that ignorance of the law is no defense. *Id.*; *see also*, *Hayes*, 786 F.2d at 1503 (stating that section 6928(d)(1) does not make knowledge of illegality an element of prosecution's case).

[112] 402 U.S. 558 (1971).

[113] *International Minerals*, 402 U.S. at 559, 563.

[114] *See Baytank*, 934 F.2d at 612-13 (citing *International Minerals*); *Hayes*, 786 F.2d at 1503 ("[I]t is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulatory provisions"); United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3d Cir. 1984) (quoting *International Minerals* which stated that "where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation."), *cert. denied*, 469 U.S. 1208 (1985).

Since RCRA only regulates the handling of "hazardous wastes," many defendants have argued that they were unaware that the substances they were dealing with were "hazardous wastes" as defined by RCRA. In every case where this defense has been raised, the court has determined that it is sufficient that the defendant knew that the wastes were potentially harmful to human health or the environment.[115] The defendant's knowledge of the harmful nature of the wastes may be proven by indirect evidence such as the defendant's prior handling of the material[116] or by documentation in the defendant's constructive possession indicating the waste's hazardous nature.[117]

With respect to the transportation of hazardous wastes, a person is not criminally liable for transporting those wastes to an unpermitted facility unless he is aware that the facility lacks the proper permit.[118] However, the defendant is guilty if he has willfully failed to determine the receiving facility's permit status.[119] This rule protects the waste generator who was misled by disposal site representatives into believing that the site possessed the requisite permit.[120] The defendant's guilty knowledge may be proven by circumstantial evidence.[121]

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[115] *Baytank*, 934 F.2d at 613; United States v. Hoflin, 880 F.2d 1033, 1039 (9th Cir. 1989) (trial court properly instructed jury that it must find that defendant disposed of waste he knew " 'had the potential to be harmful to others or to the environment' "), *cert. denied*, 110 S.Ct. 1143 (1990); *Dee*, 912 F.2d at 745 (prosecution was not required to prove that defendants were aware that chemicals they managed were "hazardous wastes;" section 6928(d) only requires knowledge of "the general hazardous character of the wastes").

[116] *See, e.g.*, United States v. Sellers, 926 F.2d 410 (5th Cir. 1991). In *Sellers*, the Fifth Circuit ruled that the trial court properly admitted evidence of prior unpermitted dumpings as proof that the defendant knew he was disposing of a hazardous waste. *Id.* at 414; *see* FED. R. EVID. 404(b).

[117] *See* United States v. Greer, 850 F.2d 1447, 1452 (11th Cir. 1988) (bill of lading described truckload as "1, 1, 1 trichloroethane." Defendant, operator of waste recycling and transportation business, testified that he knew law prohibited dumping of this substance and jury could infer that defendant knew dumping of this truckload would threaten harm to human health or environment).

[118] *Hayes*, 786 F.2d at 1504; *see* 42 U.S.C. § 6928(d)(1) ("*Knowingly* transports or causes to be transported any hazardous waste . . . to a facility which does not have a permit. . . .) (emphasis added).

[119] *Hayes*, 786 F.2d at 1504.

[120] *Id.*

[121] *Id.* According to *Hayes*, the jury may infer that a generator is aware of the absence of a permit where the disposal site agrees to take the waste at an unusually low

Section 6928(d)(2) criminalizes the treatment, storage or disposal of a hazardous waste without a permit. Because of the wording of section 6928(d),[122] a split has arisen among the circuits as to whether the defendant must be aware of the absence of a permit to be criminally liable. The question presents itself in cases where the defendant is a non-owner manager or lower-level employee who is less likely to have direct knowledge of whether his employer has a permit to treat, store, or dispose of the hazardous waste. Only the Ninth and Third Circuits have directly addressed the question. According to the Ninth Circuit in *United States v. Hoflin*,[123] the prosecution is not required to prove that the defendant knew that a necessary permit was lacking for the treatment, storage, or disposal.[124] The Third Circuit, in *United States v. Johnson & Towers, Inc.*,[125] held that the jury had to find that the defendant employees knew that their employer was required to have a permit and that they knew the employer did not have a permit.[126] The Fifth Circuit has indicated its agreement with *Hoflin*.[127]

By not requiring proof that the defendant was aware of the absence of a permit, innocent conduct is punishable. For example, if a waste generator's employee is assured by his employer that the employer has the requisite permits, the employee remains subject to criminal liability. Alternatively, if the employer tells the employee that its facility is exempt from permit requirements, the employee may be convicted for handling the wastes without a permit.[128] One court has rationalized that this

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price. This guilty knowledge may also be inferred where no evidence is presented showing the party who took the waste claimed to be permitted. *Id.*

[122] Section 6928(d)(2) deems a person criminally liable if he "knowingly treats, stores, or disposes of any hazardous waste . . . (A) without a permit. . . ." 42 U.S.C. § 6928(d)(2). The controversy arises from the absence of the word "knowing" from subpart (A).

[123] 880 F.2d 1033 (9th Cir. 1989).

[124] *Hoflin*, 880 F.2d at 1309 (stating that knowledge of absence of permit is not element of section 6928(d)(2) offense). *Hoflin* notes that Congress inserted the word "knowing" in subpart (B), but omitted it from subpart (A). *Id.* at 1036-37.

[125] 741 F.2d 662 (3d Cir. 1984).

[126] *Johnson & Towers*, 741 F.2d at 669-70.

[127] *Baytank*, 934 F.2d at 613. "To the extent *Johnson & Towers* would require knowledge of the regulations, we respectfully decline to follow it." *Id.*

[128] *See* United States v. Laughlin, 768 F. Supp. 957, 961 (N.D.N.Y. 1991) (recogniz-

result is justified because the risk of conviction for nonculpable conduct is outweighed by Congress' concern to eliminate the dangers of hazardous waste to public health and the environment.[129]

Although *Johnson & Towers* would appear to be pro-defense by requiring proof that the defendant employee knew of both the permit requirement and absence of the permit, the case recognizes the pro-prosecution "responsible corporate officer" doctrine.[130] According to *Johnson & Towers*, the jury may infer the employee's knowledge of these facts if the employee held a responsible position with the corporation.[131] More recent decisions, however, have refused to apply this presumption in other RCRA criminal cases and have required additional circumstantial proof to sustain a conviction.[132]

B. The Mens Rea Requirement in CERCLA

Only a person "in charge" of a facility may be criminally liable for failure to properly report the release of a hazardous substance.[133] Thus, the potential number of CERCLA criminal defendants is significantly smaller than the number of potential defendants under the other federal environmental acts. Only supervisory personnel with responsibility for the facility are "in

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ing that *Hoflin* ruling criminalizes innocent conduct by lower-level employees).

[129] *Laughlin*, 768 F. Supp. at 962-63. The *Laughlin* opinion stated:

> Because of Congress' concern about the dangers that hazardous waste poses to public health and the environment it is not, in this Court's opinion, at all unlikely that Congress concluded that the unpermitted treatment, storage, or disposal of hazardous waste presented such significant dangers that it warranted criminal liability regardless of whether the perpetrator was aware that a permit was legally required and knew that no such permit had been obtained.

Id.

[130] *See Johnson & Towers*, 741 F.2d at 670.

[131] *Id.*

[132] *See, e.g.*, United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 55 (1st Cir. 1991) ("In a crime having knowledge as an express element [§ 6928(d)(1)], a mere showing of official responsibility . . . is not an adequate substitute for direct or circumstantial proof of knowledge); United States v. White, 766 F.Supp. 873, 895 (E.D. Wash. 1991) ("The 'responsible corporate officer' doctrine would allow a conviction without showing the requisite specific intent [under § 6928(d)(1)] it is 'knowing,' not, 'should have known' as the prosecution suggests").

[133] 42 U.S.C. § 9603(b)(3) (1986) (Supp. 1991).

charge."[134] It is reasoned that "[t]hose in charge of an offending facility can make timely discovery of a release, direct the activities that result in the pollution,and have the capacity to prevent and abate the environmental damage."[135] Therefore, an employee "who might have knowledge of [a] release" cannot be held criminally liable for failing to report such release.[136] However, even a low ranking employee may be prosecuted if he is in a position to "detect, prevent, and abate a release of a hazardous substance."[137]

CERCLA requires actual guilty knowledge for a conviction. CERCLA's "in charge" requirement is not a rephrasing of the responsible corporate officer doctrine. Under both RCRA and CWA, guilty knowledge may be imputed to the responsible corporate officer because of his position. In contrast, CERCLA requires the person "in charge" to notify the NRC "as soon as he has knowledge of such release. . . ."[138] The submission of information to the NRC which is false or misleading is punishable, if the defendant "knows" the information is false or misleading.[139] The defendant's mere position as owner or operator of the facility will not impose a duty to report the release. The defendant must have actual knowledge of the release.[140] Although this guilty knowledge may not be imputed, it may be inferred by proof that the defendant indirectly ordered the release.[141]

Although the defendant need not be aware that his failure

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[134] United States v. Carr, 880 F.2d 1550, 1554 (2d Cir. 1989) (quoting H. R. Cong. Rep. No. 940, 91st Cong., 2d Sess. 34 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 2691, 2712, 2719). *Carr* discusses the legislative history behind the CWA reporting requirements that served as a model for CERCLA's reporting requirements. *Carr*, 880 F.2d at 1553.

[135] *Carr*, 880 F.2d at 1554 (quoting United States v. Mobil Oil Corp., 464 F.2d 1124, 1128 (5th Cir. 1972) (which discusses CWA's "in charge" requirement)).

[136] *Carr*, 880 F.2d at 1554.

[137] *Id.* In *Carr*, a section 9603 conviction of a maintenance supervisor was affirmed.

[138] 42 U.S.C. § 9603(b)(3) (1986 & Supp. 1991).

[139] *Id.*

[140] *See* United States v. Bogas, 920 F.2d 363 (6th Cir. 1990) (defendant, airport commissioner, learned of improper disposal and release after fact and then attempted to withhold this information from EPA); United States v. Greer, 850 F.2d 1447 (11th Cir. 1988) (defendant, operator of recycling facility, was aware that truckload of waste entered facility and posed disposal problem for facility but told his plant manager to "handle it").

[141] *Greer*, 850 F.2d at 1451-52.

to notify properly is illegal, he is culpable as long as he knows of the release and failed properly to report it.[142] The nature of the substance puts a person controlling that substance on notice "that criminal statutes probably regulate the handling and release of the substances."[143]

C. *The Mens Rea Requirement in CWA*

The CWA expressly embraces the "responsible corporate officer" doctrine.[144] Courts have rationalized that the high goals of the CWA, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[145] demand that persons in positions of responsibility be held accountable regardless of the degree of their conscious wrongdoing.[146] Culpable willfulness or negligence will be imputed to the defendant because of his position of responsibility.[147]

To obtain a CWA conviction, prosecutors will not be required to prove that the defendant intended to violate the law.[148] A defendant's good faith belief that his actions were exempt from CWA regulation is no defense.[149] The Fifth Circuit,

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[142] *See* United States v. Buckley, 934 F.2d 84, 88-89 (6th Cir. 1991) ("[K]nowledge as used in such regulatory statutes means knowledge that one is doing the statutorily prescribed acts, not knowledge that the statutes or potential health hazards exist").

[143] *Buckley*, 934 F.2d at 89.

[144] *See* 33 U.S.C. § 1319(c)(6) (1990) (Supp. 1991) (stating that criminally liable "person," as defined in section 1362(5), includes "any responsible corporate officer").

[145] 33 U.S.C. § 1251(a) (1988).

[146] *See* United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991) ("We think that Congress perceived this objective [set out in 33 U.S.C. § 1251(a)] to outweigh hardships suffered by 'responsible corporate officers' who are held criminally liable in spite of their lack of 'conscious wrong-doing' ").

Brittain credits the United States Supreme Court for first recognizing a common law version of the responsible corporate officer doctrine in United States v. Dotterweich, 320 U.S. 277(1943). *Brittain*, 931 F.2d at 419. In *Dotterweich*, the Court reasoned that a corporation's misdemeanors are committed by all corporate officers "who do have . . . a responsible share in the furtherance of the transaction which the statute outlaws . . . though consciousness of wrongdoing be totally wanting." *Dotterweich*, 320 U.S. at 284.

[147] *Brittain*, 931 F.2d at 1419.

[148] United States v. Frezzo Bros., Inc., 546 F. Supp. 713, 720 (E.D. Pa.), *aff'd*, 703 F.2d 62 (3d Cir. 1982), *cert. denied*, 464 U.S. 829 (1983).

[149] *Id.* at 720. ("Thus, so long as the petitioners dumped pollutants into a navigable stream without a permit, their view as to the legality of their actions is irrelevant").

in *United States v. Baytank (Houston), Inc.*,[150] recognized that specific intent to do the act which constitutes the violation is not a prerequisite to conviction since the CWA punishes both negligent and willful misconduct.[151] It is significant to note, however, that in *Baytank* the Fifth Circuit was dealing with a conviction under the pre-1987 amendment version of the CWA which penalized "willful" and "negligent" discharges evenly.[152] Although the amended CWA continues to punish negligent violations, such violations are punishable as misdemeanors whereas willful violations are now punishable as felonies.[153]

Moreover, since federal environmental violations have traditionally been pursued civilly and administratively by regulators, it would seem that criminal charges might only be pursued if these civil and administrative remedies had been exhausted. The argument has been made that for an environmental defendant to evidence criminal intent, it should first be established that civil or administrative remedies have not pushed the violator into compliance.

However, this defense was raised and rejected in *United States v. Frezzo Brothers, Inc.*[154] The Third Circuit, acknowledging conflicting legislative history on this question, concluded that the CWA presents criminal remedies as one of four equal alternatives that may be pursued where a CWA violation occurs.[155] With respect to establishing a knowing violation,

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[150] 934 F.2d 599 (5th Cir. 1991).

[151] *Baytank*, 934 F.2d at 618. (defendant unsuccessfully argued that district court failed to instruct jury that defendant had to have specific intent not to file monthly discharge monitoring reports).

[152] *Id.* at 603, 618 n.32.

[153] *Compare* 33 U.S.C. § 1319(c)(1) *with* § 1319(c)(2).

[154] 602 F.2d 1123 (3d Cir. 1979).

[155] *Frezzo Bros.*, 602 F.2d at 1126.

> Whenever on the basis of any information available to him the Administrator [of the EPA] finds that anyone is in violation of any of these requirements, he *may* take *any* of the following enforcement actions: (1) he shall issue an order requiring compliance; (2) he shall notify the person in alleged violation in such state of such finding . . . or (3) he shall bring a civil action; or (4) he shall cause to be instituted criminal proceedings.

Id. (emphasis added) (quoting House Committee Report reprinted in *A Legislative History of the Federal Water Pollution Control Act Amendments of 1972*, U. S. Gov't Printing Office, at 801-02).

"[a]lthough continued discharges after notification could be one way for the Government to prove scienter, it is certainly not the only way to establish willful violations."[156]

A CWA conviction for "knowing endangerment" requires proof of the defendant's unimputed "actual awareness or actual belief" that his actions placed another person "in imminent danger of death or serious bodily injury. . . ."[157] In *United States v. Villegas*,[158] for instance, the defendant was a doctor who knew that the discharge of medical waste and hepatitis-contaminated human blood into the river posed an imminent threat of death or serious bodily injury.[159] Circumstantial evidence may be used to establish actual knowledge of the health risk.[160] This includes "evidence that the defendant took affirmative steps to shield himself from relevant information."[161]

D. Corporate Liability: Emergence of "Collective Knowledge"

Corporate liability can be based on the unlawful acts of employees if the conduct is within the scope of the employee's actual or apparent authority.[162] Thus, the respondeat superior doctrine exposes corporations to environmental prosecutions by the acts of their employees.[163]

Moreover, the emerging theory of collective knowledge of the corporation, under recent case law, may be used to establish the knowledge element of corporate environmental crimes. Thus, in *United States v. Bank of New England*,[164] the jury was permitted to aggregate the knowledge of separate employees through facts showing that reports were required, transactions

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[156] *Frezzo Bros.*, 602 F.2d at 1126. Where the regulator has obtained punitive civil penalties, a criminal prosecution may be barred on grounds of double jeopardy. United States v. Halper, 490 U.S. 435 (1989).

[157] 33 U.S.C. § 1319(c)(3)(B)(i) (1990) (Supp. 1991).

[158] United States v. Villegas, 5 Toxics L. Rep. (BNA) 1177 (Feb. 20, 1991) (E.D.N.Y. Jan. 31, 1991).

[159] *Id.*

[160] 33 U.S.C. § 1319(c)(3)(B)(i)(II) (1990) (Supp. 1991).

[161] *Id.*

[162] *See, e.g.*, United States v. Bi-Co Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984).

[163] *See, e.g.*, Standard Oil Co. of Texas v. United States, 307 F.2d 120, 128 (5th Cir. 1962) (even subordinate, menial employees may bind corporation).

[164] 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987).

occurred, and no reports were filed, to establish criminal violations of currency transaction reporting requirements. In addition, under the willful blindness jury instruction authorized in many circuits,[165] the court found that "flagrant organizational indifference" may meet the higher "willful" requirement under environmental criminal statutes. As yet, no environmental case has addressed this issue; however, the possibility remains that collective knowledge could be applied to corporate environmental prosecutions.

IV. Conclusion

Mississippi will soon follow its bordering states by enacting a felony environmental crimes statute. The statute may be a simple upgrade of the existing misdemeanor provision in the Solid Waste Disposal Law of 1974. A recharacterization of certain SWDL violations as felonies would, of itself, give state investigators and prosecutors a significant enforcement weapon. On the other hand, Mississippi's felony crime law may take a form similar to Senate Bill 2983 and make violations of both federal and state law the subject of state court prosecutions.

Regardless of whether the new law is molded out of either the SWDL or the Senate Bill 2983 or neither, it will probably be integrated with the existing state administrative system of handling and accounting for hazardous wastes and substances. As in RCRA, CERCLA and the CWA's criminal provisions, the new law will likely punish as felonies certain violations of existing requirements for permits, documentation and notification. This would build on an administrative system already operating and refined. State regulators, currently familiar with these administrative requirements, would be equipped to detect, report and investigate environmental crimes. In many cases, violations being handled administratively or civilly could be converted to criminal cases if the requisite criminal intent were evidenced.

The new law should expressly define the element of criminal intent. As has been the experience with federal environmental crimes, if not addressed legislatively, courts will have to deter-

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[165] *Bank of New England*, 821 F.2d at 855.

mine whether ignorance of or blindness to the law is a defense. Based on federal precedent, particularly under RCRA, the judiciary is unlikely to recognize these defenses unless made statutory.

The good faith defense should be expressly adopted or rejected by the new legislation. Senate Bill 2983, as drafted, contains no such provision. This is a serious omission because it is left to the judiciary to determine whether certain innocent conduct will be punished, the defendant's diligent efforts to assure compliance notwithstanding. As has been the case under RCRA, the result might be inconsistent judicial positions on this issue which could conceivably take years to be fully resolved by the Mississippi Supreme Court.

As with the CWA's "responsible corporate officer" doctrine, the new law should also define when a person, by virtue of his position, is criminally accountable for an act or omission. Fairness dictates that persons be put on express notice of the scope of company activities for which they bear criminal responsibility. The new law, by reference to the common law that has developed under federal criminal environmental legislation, could enumerate these common law factors for the jury to consider in determining whether the defendant's office imputes criminal responsibility.

In short, waste management personnel, including CEOs and corporations themselves, will be held accountable for their neglect as well as their willfully blind or other conscious violation of environmental laws and regulations. Thus, environmental compliance will become more of a corporate and individual priority. The effect is likely to not only shift the federal-state division of criminal enforcement but also enhance the policy goal of better protecting Mississippi's natural resources and environment. Mississippi will hopefully become a less attractive dumping ground for out-of-state polluters and a more attractive home for environmentally responsible industries.

SCIENTIFIC EVIDENCE vs. "JUNK SCIENCE" — PROOF OF MEDICAL CAUSATION IN TOXIC TORT LITIGATION: THE FIFTH CIRCUIT "FRYES" A NEW TEST (*CHRISTOPHERSEN v. ALLIED-SIGNAL CORP.*)

*Gregg L. Spyridon**

Ten years after sounding an alarm over the dioxin-contaminated roadways of Times Beach, Mo., federal scientists wonder whether they acted too hastily in ordering the community's permanent evacuation. Perhaps, they say, dioxin was not such a serious threat after all. This kind of waffling only reinforces public skepticism about the credibility of scientists, who seem to change their mind with bewildering regularity whether the subject is the danger of dioxin or the benefits of oat bran.[1]

I. Introduction

According to a strictly empirical view, scientists should avoid unnecessary theorizing and higher level abstraction in or-

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[1] Gorman, *The Double Take on Dioxin*, Time, Aug. 26, 1991, at 52. EPA officials announced that since recent studies suggest that dioxin may not be as harmful as originally thought, the risks of dioxin exposure should be reassesed. *Id.*

der to make science factual and objective. They concentrate on things that could be directly observed and attempt to collect and analyze data in an objective manner. They produce knowledge by combining building blocks of irrefutable facts into higher levels of laws or postulates. Their goal is to remain as close to the data as possible, to minimize inference, and to avoid premature theorizing. Their rationale is simple: The closer one comes to achieving the goal, the more accurate the result. Little is to be gained by attempting to measure precisely poorly understood matters and then multiplying or extrapolating those observations to support a theoretical assumption.[2]

An opposing view argues that science cannot achieve the goals of the strict empiricist. The reason offered is that objectivity is illusory and, while a noble pursuit, it is impossible to achieve as there are no uncontroverted facts to serve as building blocks of knowledge. Resistance to theory discourages scientific development and the growth of knowledge. They argue that fact is inseparable from theory. Theory guides the search for facts to bolster one's view and to persuade others to accept that view while promoting scientific progress in the meantime.[3]

While modern science favors the latter, Lord Salisbury warns that the best approach of all is to remain skeptical:

> No lesson seems to be so deeply inculcated by the experience of life as that you never should trust EXPERTS. If you believe the doctors, nothing is wholesome: if you believe the theologians, nothing is innocent: if you believe the soldiers, nothing is safe. They all require to have their strong wine diluted by a very large admixture of insipid common sense.[4]

This philosophic dilemma is at the root of two conflicting approaches to the admissibility of scientific evidence in toxic tort litigation. One recent decision from the Third Circuit Court of Appeals, *In re Paoli Railroad Yard PCB Litigation*,[5] liberally

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[2] Faust and Miller, *The Empiricist and His New Clothes: DSM-III in Perspective*, 143 AM. J. PSYCHIATRY, 962, 962-67 (1985).

[3] *See generally* KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTION (2d ed. 1970).

[4] OXFORD DICTIONARY OF QUOTATIONS, 413, n. 18 (3d ed. 1979) (Letter to Lord Lytton).

[5] 916 F.2d 829 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991).

construes the Federal Rules of Evidence to resolve doubt about sound scientific evidence in favor of admissibility. The other decision from the Fifth Circuit, *Christophersen v. Allied-Signal Corp.*,[6] adopts a restrictive view of the rules of evidence and requires the judge, not the jury, to be the arbiter in the battle of the experts. To appreciate fully the impact, as well as the irreconcilable nature of these two cases, some background is necessary.

II. Courtroom Science

In tort litigation, courts distinguish between legal sufficiency and scientific certainty. As a result, a causal relationship need not always be conclusively established before an expert can testify that the relationship exists.[7] This is especially true in toxic tort cases involving medical causation questions on the frontier of science.

When little is known about the harmful effects of exposure to a particular substance, a plaintiff quite often advances novel and untested theories to make out a prima facie case of liability. When those theories are based on sound methodology and possess a reasonable degree of medical certainty, a jury should be allowed to consider them.[8] However, when novel theories are based on evidence lacking the reliability or scientific acceptability necessary to sustain the plaintiff's burden of proof (commonly referred to as "junk science"[9]), that evidence should be

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[6] 909 F.2d 362 (5th Cir. 1990), *aff'd on reh'g*, 939 F.2d 1106 (5th Cir. 1991) (en banc) *petition for cert. filed* No. 91-785 (Nov. 12, 1991).

[7] Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1535-36 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

[8] *Id.*; *see also* Bandura v. Orkin Exterminating Co., 865 F.2d 816, 821 (7th Cir. 1988) (reasonable jury verdict not disturbed); City of Greenville v. W.R. Grace & Co., 827 F.2d 975, 983 (5th Cir. 1987) (defendant's knowledge of risk associated with asbestos); Wells v. Ortho Pharmaceutical Corp., 788 F.2d 741, 744 (5th Cir.) (causal connection between chemical and injury supported by medical testimony), *cert. denied*, 479 U.S. 950 (1986).

[9] *In re* Agent Orange, 611 F. Supp. 1223, 1224 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 187 (2d Cir. 1987); *see also* J.G. Gleeson, *Understanding the "Junk" in "Junk Science": A Study in Logic and Scientific Methodology*, 387 Prac. L. Inst. 1 (1990) (noting result is unjustified findings of casuation); P. Huber, *Galileo's Revenge: Junk Science in the Courtroom* 2 (1991) (nothing that many courts even approved damage awards for traumatically induced cancer while no one today believes that bumps, bruises or falls cause cancer).

excluded from the jury.

In *Ferebee v. Chevron Chemical*,[10] an agricultural worker at a governmental research center sued a manufacturer of Paraquat alleging that he contracted pulmonary fibrosis as a result of a long-term skin exposure to diluted solutions of Paraquat. Experts on both sides of the dispute relied on the same diagnostic methodology but drew different conclusions. Chevron contended that because the expert testimony was so novel and not generally accepted in the scientific community, it should not be admitted. In particular, Chevron argued that epidemiological studies failed to corroborate the conclusions of the plaintiff's expert. In rejecting Chevron's contention, the court noted:

> [A] cause-effect relationship need not be clearly established by animal or epidemiological studies before a doctor can testify, in his opinion, such a relationship exists. As long as the basic methodology employed to reach such a conclusion is sound, such as use of tissue samples, standard tests, and patient examination, products liability law does not preclude recovery until a "statistically significant" number of people have been injured or until science has had the time and resources to complete sophisticated laboratory studies of the chemical.[11]

Ferebee was subsequently interpreted as holding that as long as a plaintiff proves to a reasonable degree of medical certainty that the defendant's chemical caused the harm complained of, the contention that the medical community might require more research and evidence before conclusively resolving the question is not relevant.[12] *Ferebee* expressed a preference for legal sufficiency of causation over scientific certainty on the assumption that the scientific evidence presented would be within either a reasonable degree of medical certainty or based on sound methodology.

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[10] 736 F.2d 1529, 1531-32 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

[11] *Id.* at 1535-36.

[12] Wells v. Ortho Pharmaceutical Corp., 788 F.2d 741, 745 (5th Cir.), *cert. denied*, 479 U.S. 950 (1986); *see* Osburn v. Anchor Laboratories, Inc., 825 F.2d 908, 915 (5th Cir. 1987) (expert's opinion need not be generally accepted in scientific community before it can be sufficiently reliable and probative in support of jury finding), *cert. denied*, 485 U.S. 1009 (1988); *see also* Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 613 (1988) (acceptance as scientific and legal basis for determining validity).

Consider the jurors who listen throughout the trial to counsels' introduction of and objection to scientific and medical evidence and the judge's eventual ruling. Without the necessary safeguard, they may incorrectly assume that all evidence accepted by the court meets the requisite levels of certainty or else it would not have been admitted. Although some argue that juries are especially adept at distinguishing between scientific evidence and junk science,[13] others may argue that scientific evidence may assume a posture of "mystic infallibility" in the eyes of a jury regardless of the unsoundness of such evidence.[14]

While merit is present in both arguments, the recent trend in many jurisdictions is to pre-screen the medical or scientific evidence a jury should consider in toxic tort cases.[15] Such scrutiny is contemplated by Rules 104, 403, 702, and 703 of the Federal Rules of Evidence,[16] but the courts have not established clear guidelines concerning which scientific or medical evidence the jury can consider.

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[13] *See* Kanner, *Ruminations on Trial by Jury: An Essay in Honor of Judge Robert S. Vance*, 5 TOX. L. REP. (BNA) 448, 450 (1990) (nothing in history of jury trials suggests that jurors follow all controversial scientific proof or that assigning weight to such proof and assessing the credibility of experts lay beyond average juror's ability); *see also* Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 484 (1956) (jury determination never highly dependable in complex litigation).

[14] *See, e.g.*, United States v. Downing, 753 F.2d 1224, 1239 (3d Cir.), *aff'd* 780 F.2d 1017 (3d Cir. 1985) (en banc); United States v. Addison, 498 F.2d 742 (D.C. Cir. 1974); *see also* Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901) (jury presumes that expert testimony is conclusive).

[15] *See generally* Christophersen v. Allied-Signal Corp., 939 F.2d at 1106 (injuries resulting from exposure to fumes containing particles of nickel and cadmium); *In re* Paoli R.R. Yard PCB Litig., 916 F.2d at 829 (injuries resulting from exposure to PCB); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (injuries resulting from exposure to chemical waste burial site); Richardson v. Richardson-Merrill, Inc., 857 F.2d 823 (D.C. Cir. 1988) (injuries resulting from exposure to Bendectin), *cert. denied*, 110 S. Ct. 218 (1989); Lynch v. Merrill-Nat'l Laboratories, 830 F.2d 1190 (1st Cir. 1987) (birth defects resulting from exposure to Bendectin); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 208 (2d Cir. 1987) (epidemiological studies of agent orange for causation); Viterbo v. Dow Chem. Co., 826 F.2d 420 (5th Cir. 1987) (injuries resulting from exposure to herbicide); Lima v. United States, 708 F.2d 502 (10th Cir. 1981) (injuries resulting from swine flu vaccination); Stiles v. Sundstrand Heat Transfer, Inc., 660 F. Supp. 1516 (W.D. Mich. 1987) (injuries resulting from emotional distress from fear of cancer after exposure from various toxic chemicals); Johnston v. United States, 597 F. Supp. 374 (D. Kan. 1984) (injuries resulting from exposure to ionizing radiation).

[16] *See infra* notes 76-81 and accompanying text.

III. THRESHOLD QUESTIONS

This close examination of the reliability, medical certainty, and methodological soundness of expert testimony is not only contemplated by the rules of evidence, but also balances two competing interests of our legal system: (1) to compensate plaintiffs who have been injured by the fault of a defendant and (2) to protect defendants against specious claims.

In determining the defendant's liability for injury caused by alleged exposure to a toxic substance, courts use scientific and medical evidence to resolve two threshold questions:

1. Whether the defendant's product can be demonstrated to have caused the harm complained of by the plaintiff; and

2. Whether the plaintiff's harm was caused by an exposure to defendant's product.[17]

In *Sterling v. Velsicol Chemical Corp.*,[18] the Sixth Circuit Court of Appeals reviewed the awards to several plaintiffs who sustained personal injuries and property damages as a result of exposure to hazardous chemicals which had leaked from a landfill and contaminated the local drinking water supply. The court approved of the district court's method of analyzing causation by dividing it into two parts. The lower court had first established that the particular contaminants were capable of producing injuries of the type allegedly suffered by the plaintiffs.[19] In the second part of the analysis, the court noted that the plaintiffs were required to prove to a reasonable medical certainty that ingesting the contaminated water caused each plaintiff's particular injuries.[20]

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[17] Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1199 (6th Cir. 1988).

[18] *Id.* at 1201-17.

[19] *Id.* at 1200.

[20] *Id.*; *see* Thompson v. Underwood, 407 F.2d 994, 997 (6th Cir. 1969) (recovery for permanent injuries must be shown to be reasonable medical certainty); Maryland Casualty Co. v. Young, 211 Tenn. 1, 362 S.W.2d 241, 243 (1962) (testimony of physician should be based on certainty, not mere likelihood or possibility); *see also* Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 861 (Tenn. 1985) (testimony is inadmissible if it fails to afford reasonable basis for conclusion); P & L Constr. Co. v. Lankford, 559 S.W.2d 793, 794 (Tenn. 1978) (expert and lay testimony may be considered to prove causation if reasonably inferred from facts); Laughlin Clinic, Inc. v. Henley, 208 Tenn. 252, 345 S.W.2d 675 (1961) (preexisting physical condition irrelevant when evidence fails to show causal connection between old and new injury).

Determining the necessary degree of medical certainty requires an analysis of several factors, but the primary factor is the degree of reliability accorded the scientific or medical evidence. Unfortunately, there is a great dearth of knowledge concerning the cause and effect relationship of exposure to many toxic substances. As a result, when scientific evidence is lacking, policy considerations arise over who should bear the consequences of this lack of knowledge. One could argue that policy considerations should preclude the defendant from excluding novel scientific theories when he has voluntarily placed a product on the market without first determining its safety. On the other hand, public policy may preclude the introduction of untested theories of causation when there is little or no evidence of any risk of harm from the defendant's product. The stakes are high.[21] Courts must decide whether and under what circumstances a jury can determine the cause-effect relationship between an illness and exposure to a toxic substance when the medical and scientific communities themselves cannot agree.[22] Central to this issue is the quality of the scientific methodology which is available to experts to formulate an opinion on the cause and effect of toxic substances.

IV. Using Frontier Science to Establish Causation

In the absence of well established medical or scientific evidence, several methodologies of varying quality are invoked to suggest causation in toxic tort litigation. Among the most common are epidemiology, animal studies, clinical ecology, structural analysis, and anecdotal data. Numerous courts have wres-

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[21] *See* Ealy v. Richardson-Merrill, 897 F.2d 1159, 1163 (D.C. Cir. 1990) ($100 million jury verdict set aside on appeal); DeLuca v. Merrill-Dow Pharmaceuticals, 911 F.2d 941, 942 (3d Cir. 1990) (summary judgment reversed and remanded due to improper exclusion of expert testimony); *see also* Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 825 (D.C. Cir. 1988) ($1.16 million jury verdict in birth defect case involving Bendectin set aside).

[22] Environmental Defense Fund v. EPA, 598 F.2d 62, 89 (D.C. Cir. 1978). In the regulatory context, where risk assessment is utilized by the government, the courts have sanctioned governmental approval of the introduction of products into the stream of commerce without conclusive testing on the grounds that "if regulation were withheld until the danger was demonstrated conclusively, untold injury to public health could result." *Id.*

tled with each of these methodologies with varying results.

A. *Epidemiology*

Epidemiology is the statistical study of the distribution and determinants of disease in human populations.[23] The epidemiologist attempts to detect trends that are not the result of mere chance. In the toxic tort context, the epidemiologist attempts to answer the question whether the plaintiff's exposure to a particular substance is more likely than not the cause of plaintiff's injuries. To define a cause-and-effect relationship, the epidemiologist examines the general population and compares the incidence of a disease among those people exposed to a particular substance to those not exposed. The epidemiologist then uses statistical reasoning to draw a biological inference between the substance being studied and the etiology of the harm sustained.[24] Because an epidemiological study evaluates groups rather than individuals, it is usually not case-specific and, therefore, cannot conclusively establish causation in a toxic tort case. However, in conjunction with more specific evidence linking the plaintiff's exposure to defendant's product, epidemiological evidence can help persuade a jury to conclude that the plaintiff's harm was more likely than not caused by the particular substance in question.[25]

B. *Animal Studies*

Animal studies attempt to establish a cause-and-effect relationship between a particular substance and the human popula-

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[23] B. Black & D. Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 FORDHAM L. REV. 732, 752 (1984) (noting importance of accurate, concise definition of disease being studied); *see also* A. Lilienfeld & D. Lilienfeld, FOUNDATIONS OF EPIDEMIOLOGY 3-18 (2d ed. 1980).

[24] A. Lilienfeld & D. Lilienfeld, *supra* note 23, at 3-18; *see* Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-In-Fact*, 7 HARV. ENV'T L. REV. 429 (1983) (due to uncertainty of control groups and jury comprehension of complex issues, epidemiology must be limited in admissibility and scope); Hall & S. Ibergeld, *Reappraising Epidemiology: A Response to Mr. Dore*, 7 HARV. ENV'T L. REV. 440, 441 (1983) (scope of epidemiology must be broadened as integral factor of proving causation). *See generally* G. Friedman, PRIMER OF EPIDEMIOLOGY 1-7 (2d ed. 1980).

[25] Brock v. Merrell-Dow Pharmaceuticals, Inc., 874 F.2d 307, 313 (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989) (en banc).

tion based upon the effect of that substance on test animals. Generally, dose and response data from animals is extrapolated to predict the effect of that substance on the human population.[26] Due to the expense and difficulty of epidemiological studies, many researchers have turned to studies of animal populations to determine the toxicity of various chemical substances.[27] However, one of the major problems with animal studies is obvious: Rats are not people with tails and people are not tailless rats! Secondly, to expedite test results, researchers often administer high doses of an alleged toxic substance to elicit a response from the animal. Accordingly, giving a high dosage to an animal may not equate to a lower dose experienced by a human individual over a greater period of time.[28] In rejecting the animal studies presented in the *Agent Orange* litigation, Judge Weinstein explained: "There is no evidence that plaintiffs were exposed to the far higher concentrations involved in both the animal and industrial exposure studies. The animal studies are not helpful in the instant case because they involve different biological species. They are of so little probative value as to be inadmissible. . . ."[29]

C. Immunotoxicity/Clinical Ecology

The thrust of immunotoxicity (also known as "chemically induced immune dysregulation"[30]) is that exposure to a particular substance suppresses the body's immune system and thereby renders the individual more susceptible to every ailment from common colds to cancer.[31] In *Elam v. Alcolac*,[32] the plaintiff suc-

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[26] *See* Pagliaro & Benton, *Court Room Science: Toxic Tort Battle Ground*, 3 Tox. L. Rev. 1336 (March 22, 1989); *see also* Landau & O'Riordan, *Of Mice and Men: The Admissibility of Animal Studies to Prove Causation in Toxic Tort Litigation*, 25 Idaho L. Rev. 521, 548-60 (1988-89) (noting that, beyond limitations imposed by expert testimony requirements, admissibility of animal toxicity studies is further reduced by relevance and hearsay limitations).

[27] Landau & O'Riordan, *supra* note 26, at 532.

[28] *Id.* at 545. The unreliability extrapolation was considered. *Id.*

[29] *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1235 (1988).

[30] Elam v. Alcolac, 765 S.W.2d 42, 86 (Mo. Ct. App. 1988).

[31] *See* Rothman & Maskin, *Defending Immunotoxicity Claims*, 3 Tox. L. Rev. 1219 (1989).

cessfully used an immunotoxicity theory to recover a $49 million verdict for immune system damage caused by exposure to Alcolac's chemicals. The plaintiff's experts concluded that the plaintiff suffered from "systematic, progressive chemical intoxication" caused by exposure to Alcolac's chemicals and testified that the exposure "dampened the immune system so that plaintiffs would become subject to a variety of diseases" including cancer.[33] Immunotoxicity theories are at the very frontier of medical science and have not been widely accepted in the medical community.[34] Critics contend that the link between environmental exposures and immune system dysregulation is conclusory and factually unsubstantiated.[35] Critics also say that the immunotoxicity theory cannot distinguish symptoms of immune system dysregulation from any number of other ailments or causes. Thus, while the *Elam* court accepted the immunotoxicity theory, other courts, including the Sixth Circuit in *Sterling*, have rejected it.[36]

D. Structural Analysis

When there is little or no toxicity data available on a particular chemical, toxicologists have tried to equate or analogize the suspect chemical to a similar substance whose toxicity is better known. The flaw in this method is that while there are a great many chemicals with similar molecular structures, each differs from the others in many ways including the degree of toxicity. For example, vinyl chloride and polyvinyl chloride are structurally similar but while vinyl chloride is highly toxic,[37] polyvinyl chloride is considered sufficiently harmless for use in making plastic pipe for household and commercial plumbing.[38]

A variation of the structural analysis argument occurred in

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[32] 765 S.W.2d 42 (Mo. Ct. App. 1988).

[33] *Id.* at 86.

[34] California Medical Association Scientific Board Task Force on Clinical Ecology, *Clinical Ecology-A Critical Appraisal*, 144 W. J. MED. 239 (1986).

[35] *Id.*

[36] *See supra* notes 8-11.

[37] *See* 40 C.F.R. § 61.01 (1990) (vinyl chloride designated as hazardous air pollutant).

[38] United States v. Serafini, 750 F. Supp. 168, 171 (M.D. Pa. 1990).

Christophersen v. Allied-Signal Corporation.[39] The plaintiff alleged that her husband had developed colon cancer and died as a result of exposure to cadmium. In the face of strong epidemiological evidence to the contrary, plaintiff's expert argued that since cadmium had been shown to cause lung cancer and since the tissues in the lung and colon were similar, the cadmium exposure caused the decedent's colon cancer. For reasons more fully discussed below, the Fifth Circuit Court of Appeals affirmed the trial court's exclusion of testimony by plaintiff's expert because this sort of "structural analysis" reasoning had not been generally accepted by the scientific community.[40]

E. Anecdotal Data/Clinical Studies

Where the effects of a substance are mild, non-fatal, short-term, and completely reversible, ethical considerations usually do not prohibit testing humans in highly controlled laboratory settings. Referred to as clinical studies, these studies tend to be very reliable but are necessarily limited. Cases involving serious, latent illnesses such as cancer which can arise out of long term, chronic, low-dose exposures cannot be accurately examined in human clinical studies. Where such an illness is involved, anecdotal data is often proffered as a means of establishing causation. Anecdotal data is essentially the result of case studies where the occurrence of a particular disease is reported or documented following an exposure to a certain chemical. Reduced to its simplest form, the anecdotal argument is that since plaintiff was healthy before being exposed to a particular substance and developed a disease after exposure, the substance caused the disease. Generally, clinical studies and anecdotal evidence have been allowed when coupled with other methodologies.[41] However, standing alone, they have not been well received as in *Viterbo v. Dow Chemical Co.*,[42] where the Fifth Circuit affirmed

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[39] 902 F.2d 362 (5th Cir. 1990), *aff'd on reh'g*, 939 F.2d 1106 (5th Cir. 1991) (en banc), *petition for cert. filed* No. 91-785 (Nov. 12, 1991).

[40] *See generally* Pagliaro & Benton, *supra* note 26.

[41] Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1535 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

[42] 826 F.2d 420, 421 (5th Cir. 1987).

the trial court's refusal to allow the anecdotal data offered by the plaintiff's treating physician. The court explained:

> Dr. Johnson's opinion rests on Viterbo's statements that he experienced certain symptoms and that Tordon 10K was the only possible cause. This opinion simply lacks the foundation and reliability necessary to support expert testimony. . . . Dr. Johnson has admitted that Viterbo's symptoms could have numerous causes and, without support save that of Viterbo's oral history, simply picks the cause that is most advantageous to Viterbo's claim.[43]

V. Trends in the Use of Novel and Untested Theories of Medical Causation: The Bendectin Cases

As stated earlier, when a causation issue is novel and stands at the frontier of current medical and scientific research, a cause-effect relationship need not be clearly established before a doctor can testify that, in his opinion, such a relationship exists. This is true as long as the basic methodology employed to reach such a conclusion is sound. However, once a cause-effect relationship has been established by sound methodology such as epidemiological studies,[44] novel and untested theories which would contradict those studies have not been well received by the courts. Although epidemiology is *not* without its shortcomings,[45] in some instances it is the preferred methodology for establishing causation. This is perhaps best seen in cases involving Bendectin, which the Food and Drug Administration approved for sale in the United States in 1956 to alleviate morning sickness.[46] Subsequently, women who had taken Bendectin during pregnancy alleged that it was a teratogen, a substance that causes birth defects. As a result, numerous lawsuits were filed against the various manufacturers of Bendectin.[47] Beginning in 1963, a number of epidemiological studies were undertaken to establish whether any cause-effect relationship existed between

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[43] *Id.* at 424.

[44] *Cf.* notes 21-23 and accompanying text.

[45] *Id.*

[46] Lynch v. Merrell-Nat'l Laboratories, 830 F.2d 1190, 1191 (1st Cir. 1987).

[47] *Lynch*, 830 F.2d at 1191.

Bendectin and birth defects. The studies were undertaken by specialists in a variety of fields including gynecology, public health, embryology, and teratology. The studies, which were being published as late as 1986, failed to establish any causal connection between the use of Bendectin and birth defects.[48]

In the face of these overwhelming epidemiological findings, plaintiffs began to advance new and untested theories of a cause-effect relationship between Bendectin and birth defects. With very few exceptions, most jurisdictions excluded these innovative theories of medical causation. In *Lynch v. Merrell-National Laboratories*,[49] the First Circuit Court of Appeals excluded medical testimony that Bendectin could cause limb reduction based on *in vivo* (animal) and *in vitro* (tissue culture) studies. Similarly, the D.C. Circuit Court of Appeals in *Richardson v. Richardson-Merrell, Inc.*,[50] affirmed the grant of a judgment n.o.v. in favor of the manufacturer of Bendectin and held that expert testimony on Bendectin's chemical structure based on *in vitro* and *in vivo* studies was not sufficient to allow a jury to determine causation in the face of strong epidemiological evidence to the contrary.

Following the lead of the First and D.C. Circuits, the Fifth Circuit next considered the sufficiency of evidence to establish causation. In *Brock v. Merrell-Dow Pharmaceuticals, Inc.*,[51] the Fifth Circuit affirmed the grant of a judgment n.o.v. in favor of the manufacturer of Bendectin where the plaintiffs had attempted to use animal studies to contradict well established epidemiological studies to the contrary. The Fifth Circuit found that Brock's failure to present statistically significant epidemiological proof that Bendectin causes limb reduction defects was fatal to their case. The court explained its holding as follows: "While we do not hold that epidemiologic proof is a necessary element in all toxic tort cases, it is certainly a very important element. This is especially true when the only other evidence is in the form of animal studies of questionable applicability to

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[48] *Id.*; *see* Beckman & Brent, *Mechanism of Known Environmental Teratogens: Drugs, and Chemicals*, 13 CLINICS IN PERANATOLOGY 649, 652 (1986).

[49] 830 F.2d at 1194.

[50] 857 F.2d 823, 826 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989).

[51] 874 F.2d 307, 313 (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989) (en banc).

humans."[52]

VI. The Conflict Begins: The Third Circuit Leaves Things "Un-Done"

In *Ealy v. Richardson-Merrell, Inc.*,[53] the plaintiffs offered the expert testimony of Dr. Allen K. Done, who testified that Bendectin caused their son's deformed limbs. The expert based his opinion on an analysis of Bendectin's chemical structure, *in vivo* studies in which animals were subjected to Bendectin during fetal formation, *in vitro* studies involving microscopic examination of animal cells subjected to Bendectin during cell division, and reinterpretations of the defendant's epidemiological evidence. The district court allowed Dr. Done's testimony on the basis that it was an opinion from a qualified expert which provided evidence helpful to the jury and that the data used by the expert was of the type reasonably relied upon by experts in the field. A $100 million jury verdict in favor of the plaintiffs was subsequently set aside by the D.C. Court of Appeals on the grounds that Dr. Done's scientific data was identical to evidence proffered in other Bendectin cases that had found, as a matter of law, that Bendectin was not a teratogen. The Court of Appeals held:

> We find that this case is squarely within the binding rule articulated in *Richardson*: an expert opinion that Bendectin is a human teratogen which caused the plaintiff's birth defects is without scientific foundation under Federal Rule of Evidence 703 in the face of "a wealth of published epidemiological data" to the contrary.[54]
>
> The Third Circuit Court of Appeals recently reviewed the qualifications of Dr. Done and his scientific evidence that Bendectin is a teratogen and, unlike the First, Fifth, and D.C. Circuits, concluded that Dr. Done's opinions were admissible. In *DeLuca v. Merrell-Dow Pharmaceuticals*,[55] the trial court

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[52] *Brock*, 874 F.2d at 313.

[53] 897 F.2d 1159, 1161 (D.C. Cir. 1990); *see Richardson*, 857 F.2d at 830-32 (expert testimony regarding *in vivo*, *in vitro*, and chemical testing of Bendectin not sufficient to override epidemiological studies).

[54] *Ealy*, 897 F.2d at 1160 (quoting *Richardson*, 857 F.2d at 832).

[55] 911 F.2d 941, 943 (3d Cir. 1990).

excluded testimony offered by Dr. Done identical to that offered in *Ealy*. The trial court excluded Dr. Done's testimony because it was not based on data upon which experts in the field reasonably relied. The court cited the growing number of Bendectin cases which concluded that the scientific community had not recognized a cause-effect relationship between Bendectin and birth defects.[56] On appeal, the Third Circuit reversed on the grounds that the exclusion of Dr. Done's testimony did not comply with the standard set forth in *In re Japanese Electronic Products Anti-Trust Litigation*.[57] In that case, the Third Circuit held that the court need only determine whether the expert opinion is based upon data reasonably relied upon by experts in the field. Once the court decides that proferred evidence meets this standard, it is up to the jury to determine what weight to give that evidence.[58]

While the Third Circuit was primarily concerned with the fact that the trial court may have relied too heavily upon the Bendectin case law in excluding Dr. Done's opinion, the court made the following comments regarding epidemiological conclusions about Bendectin:

> [W]e do not view the absence of statistically significant findings or the great weight of contrary opinion as being relevant. . . . [O]nce there is a showing that an expert's testimony is based on the type of data a reasonable expert in the field would use in rendering an opinion on the subject at issue. . . . When a statistician refers to a study as "not statistically significant," he is not making a statement about the reliability of the data used, rather he is making a statement about

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[56] *Id.* at 943-44.

[57] 723 F.2d 238 (3d Cir. 1984), *rev'd on other grounds sub nom.* Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); *see also* Peteet v. Dow Chem. Co., 868 F.2d 1428, 1433-34 (5th Cir.) (experts may derive different opinions from same methods; results are for trier of fact to weigh), *cert. denied*, 110 S. Ct. 328 (1989); Osbourn v. Anchor Labs, Inc., 825 F.2d 908, 914-16 (5th Cir. 1987) (experts' opinions need not be generally accepted by other experts but those methods of arriving at that opinion must be generally accepted), *cert. denied*, 485 U.S. 1009 (1988).

[58] *DeLuca*, 911 F.2d at 278; *see also* Seese v. Volkswagenwerk A.G., 648 F.2d 833, 844-45 (3d Cir.) (accident reconstruction expert may testify to injuries suffered because of expert's knowledge of how injuries occurred), *cert. denied*, 454 U.S. 867 (1981); Villari v. Terminex Int'l, Inc., 663 F. Supp. 727, 729 (E.D. Pa. 1987) (weight given to testimony is for jury to decide).

> the propriety of drawing a particular inference from that data.[59]

DeLuca is not in accord with most circuits which have, with some regularity, excluded novel methodologies which contradict well-established epidemiological studies.[60] However, where there is no well-established epidemiological study, courts have been more willing to allow the more innovative methodologies to establish a cause-and-effect relationship.[61] In either case, most courts have begun to scrutinize carefully medical and scientific evidence[62] to determine whether they have the necessary indicia of reliability to be admitted into evidence for the jury's consideration. Trying to determine where to draw the line has not been easy, and the various exclusionary rules of evidence which are available to courts offer very little guidance for making the right decision.

VII. Exclusion of Scientific Evidence: *Frye* and the Federal Rules of Evidence

A. The Frye Test

Expert testimony was first permitted only where it would assist the court or jury, and then only after a showing of the factual basis of the opinion.[63] Once the court determined that expert testimony was needed and then established the testimony's factual basis, no challenge to the expert testimony was permitted even if there was a question concerning reliability,

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[59] *DeLuca*, 911 F.2d at 953.

[60] *See* Brock v. Merrell-Dow Pharmaceuticals, Inc., 874 F.2d 307, 313 (5th Cir.) (peer review important consideration in determination of admissibility of expert testimony), *modified*, 884 F.2d 166 (5th Cir. 1989) (en banc); *Lynch*, 830 F.2d at 1196 (expert witness' opinions excluded because opinions were never published); *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 187, 190 (2d Cir. 1987) (certain expert testimony inadmissible if inconsistent with majority of expert opinions in field).

[61] *See* Wells v. Ortho Pharmaceutical Corp., 788 F.2d 741, 744-45 (5th Cir.) (expert testimony must be soundly based in accepted methodology with respect to facts of each specific case), *cert. denied*, 479 U.S. 950 (1986); Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1535-36 (D.C. Cir. 1984) (sound method of arriving at opinion outweighs whether epidemiological or animal studies have been performed).

[62] *See, e.g., supra* notes 10-12 and accompanying text.

[63] *See* McCormick on Evidence § 203, 604-10 (3d ed. 1984) (addressing admissibility and weight accorded scientific tests and expert testimony).

prejudice, or the expert's qualifications.[64] This situation continued until 1923 when *Frye v. United States*[65] was decided. In *Frye*, the D.C. Circuit Court of Appeals refused to allow expert testimony in a criminal case concerning an "experimental" polygraph that measured systolic blood pressure. The court concluded that the polygraph was not "widely accepted in the scientific field in which it belongs" and observed that:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*[66]

The *Frye* test became the standard throughout the United States[67] until the mid-1970's when the emergence of highly sophisticated technology and complex litigation forced many jurisdictions to begin questioning *Frye*. *Frye* was criticized because it had been used to exclude new scientific evidence regardless of its reliability simply because it had not yet been widely accepted by the scientific community.[68] While some courts, like the Third Circuit, rejected *Frye* outright on the grounds that it was insufficient to deal with novel scientific evidence,[69] others concluded that *Frye* was implicitly overruled by the enactment of the Fed-

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[64] Frye v. United States, 293 F.2d 1013, 1014 (D.C. Cir. 1923).

[65] *Id.*

[66] *Id.* (emphasis supplied).

[67] *See generally*, Note, *Changing the Standard for the Admissibility of Novel Scientific Evidence*, 40 OHIO ST. L.J. 757, 759-60 nn.18-23 (1979) (listing acceptance of various tests and analysis under *Frye*) (authored by Betty Steingass).

[68] *See* Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases*, 8 UTAH L. REV. 313, 325 (1963) (admissibility of radar speed detection devices, breath intoxication devices, lie detector devices and psychiatric evidence); Ducker & Handker, *Voiceprint Identification Evidence—Out of the Fry Pan and Into Admissibility*, 26 AM. U. L. REV. 314, 372 (1977) (analysis of *Frye* test in admission of spectrographic evidence).

[69] *See* United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985) ("a particular degree of a scientific technique within the scientific community is neither acceptance of a necessary nor a sufficient condition for admissibility . . .").

eral Rules of Evidence.[70] Nevertheless, a small minority continued to utilize *Frye* to sift through the medical and scientific evidence proffered in complex toxic tort litigation.[71]

In *Sterling v. Velsicol*, the Sixth Circuit seemed to embrace *Frye* when it required the analysis of the following three factors: "(1) the qualifications of the witnesses; (2) *the acceptance in the scientific community of their theories*; and (3) the degree of certainty as to their conclusions."[72] The *Sterling* court went on to scrutinize the medical and scientific evidence necessary to justify an award to the five plaintiffs representing the class. While affirming certain awards of damage, the court rejected other awards where the scientific evidence was lacking. In particular, the Sixth Circuit reversed an award on the grounds that testimony establishing causation was based on a field of study which had not been formally recognized.[73] The court noted:

> Plaintiffs' experts neither performed nor could identify any studies of the effects of carbon tetrachloride or chloroform on the immune system. In reaching their conclusions of immune system dysregulation, plaintiffs' experts neither personally examined or interviewed plaintiffs, nor performed the requisite medical tests . . . . Without the requisite clinical tests and *a widely accepted medical basis* for reaching its conclusions, plaintiffs' experts' opinions are insufficient to sustain plaintiffs' burden of proof that the contaminated water damaged their immune system.[74]

At the heart of the court's rejection of the plaintiffs' experts was the requirement of a "widely accepted medical basis" before a medical or scientific expert's conclusion could be considered by the jury.[75] While this approach was contemplated by *Frye*, "ac-

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[70] *See, e.g.*, United States v. Williams, 583 F.2d 1194, 1198 (2d Cir. 1978). The court stated the difficulty in applying the *Frye* test "has led a number of courts to its implicit modification." *Id.*

[71] *See* United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984) (acknowledgement of unresolved question of whether Federal Rules of Evidence have abolished or adopted *Frye* test).

[72] *Sterling*, 855 F.2d at 1200 (emphasis by court).

[73] *Id.* at 1208 (noting that clinical ecology had been rejected as legitimate scientific field by several professional associations).

[74] *Id.* at 1208-09 (emphasis added).

[75] *Id.*

ceptance by the scientific community" is a *Frye* requirement which does not appear in the Federal Rules of Evidence.

B. The Federal Rules of Evidence

The Federal Rules of Evidence impose an affirmative duty on the trial judge to make a preliminary determination concerning the admissibility of evidence. In particular, Rule 104(a) provides that "[p]reliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court."[76]

In the preliminary determination of the admissibility of evidence, the court must decide complex questions of what evidence the jury should be allowed to consider. Hence, the court is guided by several other rules of evidence. For example, Rule 402 provides that "all relevant evidence is admissible" except as otherwise provided by the Rules. One exception provided in Rule 403 is that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[77] Novel and untested theories of medical causation are good examples of relevant evidence which may be nevertheless excluded under Rule 403. The jury may be misled when these theories, which may be based on underlying flawed methodology, are presented by an expert with an endless list of credentials and assume an aura of "mystic infallibility."

While Rules 104 and 403 are broadly written to cover both lay and expert testimony, the Federal Rules of Evidence also provide specific guidance for expert testimony. For example, Rule 702 provides, "[I]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[78]

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[76] FED. R. EVID. 104.

[77] FED. R. EVID. 403. *See generally* C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURES § 5213, 230 (Supp. 1991) (addressing scope of Rule 403).

[78] FED. R. EVID. 702; *see* Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1135 (5th Cir. 1985) (construing qualifications of Rule 702 as threshold inquiry).

While Rule 702 allows a court to admit scientific evidence offered by a "qualified" expert if it will assist a jury, Rule 703 further limits that evidence to what is "reasonably relied upon by experts in the particular field":

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[79]

Questions regarding the scientific bases of an expert's opinion generally affect the weight accorded that opinion rather than its admissibility.[80] However, where the underlying facts and data are not reasonably relied upon by other experts in the same field and the opinion is of no assistance to the jury, Rule 703 requires exclusion of the opinion.[81]

Rule 703 has been subject to conflicting interpretations. As noted at the outset and again in the Bendectin cases, two distinct approaches to the admissibility of novel scientific evidence have developed which appear hopelessly irreconcilable.

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[79] FED. R. EVID. 703; *see* Slaughter v. Southern Talc Co., 919 F.2d 304, 306 (5th Cir. 1990) (construing factual basis of Rule 703 as threshold inquiry); Greenwood Util. Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1495 (5th Cir. 1985) (expert can discuss facts or data if of type reasonably relied upon by experts in particular field); Soden v. Freightliner Corp., 714 F.2d 498, 502 (5th Cir. 1983) (rules of evidence require examination of reliability of sources of expert's opinion).

[80] Viterbo v. Dow Chem. Co., 826 F.2d 420, 422 (5th Cir. 1987); *see also* Dixon v. International Harvester Co., 754 F.2d 573, 580 (5th Cir. 1985) (testimony should have been considered by court in examining sufficiency of evidence in particular field).

[81] *Viterbo*, 826 F.2d at 422; *see* Slaughter v. Southern Talc Co., 919 F.2d at 306 (affidavits of two doctors that "represented nothing more than base conclusions derived from erroneous data" held inadmissible for summary judgment purposes); Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1124 (5th Cir. 1988) (expert conclusions "lacked probative value because it was pure speculation based on negative inference drawn from the testimony of three treating physicians"); Thompson v. Southern Pac. Transp. Co., 809 F.2d 1167, 1169 (5th Cir. 1987) (experts' opinion on dioxin as source of plaintiff's illness had "insufficient factual basis" because expert had no knowledge of amount or duration of exposure); *Freightliner Corp.*, 714 F.2d at 502 (inquiry into foundation of expert's opinion should focus on reliability).

VIII. Conflicting Approaches

A. *The Third Circuit Strikes First In re Paoli Railroad*

In *In re Paoli Railroad Yard PCB Litigation*,[82] the plaintiffs, who lived near the Paoli Railroad Yard, alleged personal injuries from PCB exposure. The plaintiffs proffered animal studies and meta-analysis[83] to support their causation theories. The defendants, seeking summary judgment, presented affidavits from eighteen physicians concluding that no reasonable medical or scientific basis supported a finding that prolonged exposure to PCBs caused the plaintiffs' alleged injuries. The district court concluded that while animal studies may be useful in determining potential public risk in a regulatory context, such studies were totally irrelevant in a tort context and excluded the evidence under Rule 703 of the Federal Rules of Evidence.[84] The trial court also excluded the plaintiffs' meta-analysis on the grounds that it was a novel technique not "generally accepted" among the scientific community and therefore inadmissible under Rule 702 of the Federal Rules of Evidence.[85]

On appeal, the Third Circuit reversed on the grounds that the lower court failed to make any specific findings that the animal studies were not reliable.[86] The Third Circuit also reversed the trial court's exclusion of plaintiffs' meta-analysis on the grounds that the trial court improperly applied the Third Circuit's *United States v. Downing*[87] standard for analyzing novel scientific evidence under Rule 703.[88] In *Downing*, the Third Circuit had expressly rejected *Frye* and held that the trial court is required to focus on the following factors in ruling on the admissibility of novel scientific techniques under Rule 702 and 703:

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[82] 916 F.2d 829 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991).

[83] In re *Paoli*, 916 F.2d at 856. Meta-analysis involves the combining of the results of different epidemiological studies done by other scientists and reanalyzing the combined data to see if it renders different results than the individual studies. *Id.*

[84] *In re* Paoli R.R. Yard Litig., 706 F. Supp. 358 (E.D. Pa. 1988).

[85] In re *Paoli*, 916 F.2d at 856.

[86] *Id.* at 846.

[87] 753 F.2d 1224 (3d Cir. 1985).

[88] In re *Paoli*, 916 F.2d at 856.

> 1. The soundness and reliability of the process or technique used in generating the evidence;
> 2. The possibility that admitting the evidence [will] overwhelm, confuse or mislead the jury; and
> 3. The proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case.[89]

In *Downing*, the district court rejected the plaintiff's meta-analysis on the basis that it had not been "peer reviewed."[90] The Third Circuit concluded that neither the above analysis nor the Federal Rules of Evidence require expert opinions to be based solely upon reasoning subjected to peer review. While peer review may be one factor to consider in applying the *Downing* standard, the Third Circuit found the record devoid of any other specific findings of reliability.[91] In *Paoli*, the district court observed that the *Downing* court may have been more concerned that the trial court was "choosing between opinions as opposed to excluding plaintiff's opinion on evidentiary grounds."[92]

B. The Fifth Circuit Strikes Back: Christophersen v. Allied-Signal, Corp.

In *Brock v. Merrell-Dow*, the Fifth Circuit cautioned that district judges should "be especially vigilant in scrutinizing the basis, reasoning, and conclusiveness of studies presented by both sides."[93] Heeding the advice of *Brock*, the District Court for the Western District of Texas excluded the testimony of the plaintiff's sole witness on medical causation in *Christophersen v. Allied Signal Corp.*[94] The plaintiff had alleged that her husband's death from colon cancer had been caused by exposure to nickel and cadmium fumes at his place of employment. Epidemiological studies had failed to show any cause-effect relationship between cadmium exposure and colon cancer but the plaintiff's ex-

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[89] *Downing*, 753 F.2d at 1237.

[90] In re *Paoli*, 916 F.2d at 857.

[91] *Id.* at 858.

[92] *Id.* at 853.

[93] 874 F.2d 307, 315 (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989) (en banc).

[94] 902 F.2d 362, 364 (5th Cir. 1990), *aff'd on reh'g* 939 F.2d 1106 (5th Cir. 1991) (en banc), *petition for cert. filed* No. 91-785 (Nov. 12, 1991).

pert cited other studies which had shown a causal relationship between cadmium exposure and lung cancer. He claimed that because of the nature of small-cell carcinoma, exposure to chemicals that are associated with small-cell carcinoma of the lung are likely to be associated with cancer elsewhere in the body. Following *Brock*, the trial court found the plaintiff's scientific evidence too speculative to support causation and excluded it under Rule 703 as not based on facts and data reasonably relied upon by experts in that field.[95]

On appeal, a three-judge panel of the Fifth Circuit reversed, holding that the district court had "chosen sides in the battle of experts and thereby usurped the role of the jury."[96] Since the three-judge panel's decision was irreconcilable with *Brock*, a petition for a rehearing en banc was granted and on August 15, 1991, the Fifth Circuit rebuffed the Third Circuit's approach and reversed the three-judge panel's decision to admit the plaintiff's expert. By doing so, the Fifth Circuit fashioned a new, more restrictive standard for determining the admissibility of expert testimony which, among other things, incorporated the *Frye* test.[97]

In *Christophersen*, the Fifth Circuit established the following four-prong test:

1. Whether the witness is qualified to express an expert opinion, (Fed. R. Evid. 702);[98]

2. Whether the facts upon which the expert relies are the same type as are relied upon by other experts in the field; (Fed. R. Evid. 703);[99]

3. Whether in reaching his conclusion, the expert used a well-founded methodology; (*Frye*),[100] and

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[95] *Christophersen*, 902 F.2d at 364.

[96] *Id.*

[97] *Christophersen*, 939 F.2d at 1106.

[98] *Id.*

[99] *Id.* Noting that formal credentials are not a prerequisite, the court recognized that a witness, because of his specialized knowledge, skill, experience, training or education may be qualified to express an opinion on the topic at issue but that qualifications are not a substitute for scrutinizing an expert's reasoning or methodology. *Id.*

[100] *Id.* According to the court, this factor is applicable only where the underlying data is not independently admissible such as reports and statements of patients, other doctors, nurses or medical personnel customarily relied upon by experts in the field as

4. Assuming the expert's testimony has passed rules 702 and 703 and the *Frye* test, whether under Federal Rules of Evidence 403, the testimony's potential for unfair prejudice substantially outweighs its probative value.[101]

The Fifth Circuit cautioned that these factors were only "guideposts" that were *not* to be "applied mechanically." Nevertheless, the court explained that the first three steps were "threshold requirements" that *must* be met, while the fourth step was a safety valve, "a final mechanism for screening out otherwise admissible testimony whose potential for prejudice substantially outweighs its probative value."[102]

The controversial opinion, which drew a thirty-five page dissenting opinion by Judge Reavley with whom Circuit Judges King, Johnson, and Wiener joined, and a separate dissenting opinion by Judge King, makes it abundantly clear that the arbiter of the battle of experts, at least in toxic tort cases in the Fifth Circuit, is to be the judge and not the jury. In the words of dissenting Judge Reavley:

> Today the Court "takes hold" of expert testimony by taking over. The per curiam opinion effectively allows judges to decide the reliability, weight and relative merit of expert opinions, at least in toxic tort cases. And with such control, we signal a willingness to increase the proof and persuasion burdens of the disfavored party.[103]

While establishing a much-needed standard for evaluating novel scientific evidence, the *Christophersen* test is nevertheless vulnerable in one major respect: It relies too heavily on the *Frye* test, which has arguably been legislatively overruled by the en-

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opposed to the personal observations of the expert. *Id.*

[101] *Id.* Explaining their interpretation of *Frye*, the court stated that while a witness must use a well-founded methodology or mode of reasoning sufficiently established to have gained general acceptance in the particular field in which it belongs, the *expert's opinion* need not be generally accepted in the scientific community even if it is controversial or unique. *Id.* at 1111 (citing Osburn v. Anchor Laboratories, Inc., 825 F.2d 908 (5th Cir. 1987), *cert. denied*, 485 U.S. 1009 (1988)).

[102] *Christophersen*, 939 F.2d at 1122 (Reavley, J., dissenting).

[103] *Id.* The court states that unlike rules 702 and 703, rule 403 crested a power to exclude otherwise admissible evidence. *Id.* It gives no distinction to admit evidence that was subject to exclusion under some other rule. *Id.* at 1112.

actment of the Federal Rules of Evidence. Furthermore, *Christophersen*'s reliance on *Frye* also makes it vulnerable to the same shortcomings which led to the abandonment of *Frye* by the majority of jurisdictions around the country.[104] Nevertheless, *Christophersen* not only creates a new test but also sends the strongest signal yet to the district courts that the handling of experts and the outcomes in toxic tort cases that have been left to the jury have too often been unacceptable and it is time for the court to "tak[e] over."[105]

IX. Conclusion

Hopelessly irreconcilable, *Christophersen*[106] and *In re Paoli R.R. Yard* are testimonials to the vagueness of the Federal Rules of Evidence and the questionable viability of *Frye*. At the core of the controversy is the quality of the scientific data being proffered to establish a causal relationship between various toxic substances and various physical impairments. It is of little comfort to the uprooted residents of Times Beach and the companies that have been asked to pay the high tab for dioxin contamination that the experts may have been wrong and that the draconian evacuation may have been premature or an outright mistake.

If the scientific and medical community cannot agree on the cause and effect of exposure to a toxic substance, is the jury the proper place to resolve the controversy? Probably not. But we cannot simply abandon the injured plaintiff because the medical and scientific community cannot agree on the harmful effects of a product. Nor can we hold the defendant hostage to "junk science" theories which prey on the public hysteria generated by the media's portrayal of the "toxic age" in which we live. We must continue to require the court to take a closer look at scientific evidence and to tighten the rules on expert witnesses to

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[104] *Id.* at 1122 (Reavley, J., dissenting); *see supra* notes 67-69 and accompanying text.

[105] *Christophersen*, 939 F.2d at 1122 (Reavley, J., dissenting).

[106] *See also Brock*, 874 F.2d at 311 (courts may look behind expert's conclusions in determining causation of drug and injuries complained of); *Viterbo*, 826 F.2d at 423 (where expert's opinion is unsupported, jury never allowed to hear testimony).

weed the "junk" out of the science in the courtroom. Although both the Third and Fifth Circuits could argue that their approaches accomplish this goal, each has obvious shortcomings. The Third Circuit continues to encourage the development of novel theories, refusing to stem the rising tide of recovery in questionable toxic tort cases.[107] Unhappy with the results in many toxic tort cases, the Fifth Circuit has ordered the district courts to take over and exclude scientific theories which might be valid but which have not yet been generally accepted by the scientific community.[108]

The one point that both the Fifth and Third Circuits seem to miss is the fundamental distinction between methodology and opinion. While the Third Circuit requires only sound methodology as the basis for expert opinion and the Fifth Circuit requires one generally accepted in the scientific community, neither is especially adept at defining just where methodology ends and opinion begins. For example, the problem with the polygraph test is not the machine or the methodology for accurately measuring the body's galvanic skin response. Instead, the problems are those "opinions" which the polygraph operator interprets from the polygraph machine.[109] Scientists use a generally accepted laboratory methodology when they expose laboratory animals to a toxic substance and these animals develop cancer. However, in toxic tort litigation, when the results of the animal study are extrapolated to the human population, are we dealing with a methodology or an opinion? Are findings of structured analysis, clinical ecology (immunotoxicity) *in vitro* studies, and anecdotal data methodology or opinion? In *DeLuca*,[110] Dr. Done concluded that Bendectin epidemiological studies are not "statistically significant" despite substantial evidence to the contrary. Opinion or methodology? Despite contrary epidemiological evidence, *Christophersen*'s dissent would have allowed the expert to draw inferences about the structural similarities of the lung and colon under the guise of opinions and then to claim

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[107] *See supra* notes 82-92 and accompanying text.
[108] *See supra* notes 93-102 and accompanying text.
[109] *See supra* note 9.
[110] *See supra* note 55.

that cadmium caused colon cancer. Unless we are given better guidance for distinguishing between methodology and opinion, the courts will continue to struggle with the admissibility of novel scientific evidence regardless of whether they adopt the Fifth Circuit or Third Circuit standard. Until the United States Supreme Court addresses the appropriate standards for establishing causation in the toxic tort context, the admissibility of novel and untested scientific theories may, unfortunately, continue to depend upon where the suit is filed rather than upon standards grounded in logic and reason.[111]

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[111] *Compare* Adams v. Chevron, U.S.A., Inc. No. 90-CA-1750 (La. Ct. App. Nov. 14, 1991) (1991 Westlaw No. 236301) (Louisiana state circuit court adopting *Christophersen* standard) *with* Cherico v. National R.R. Passnger Corp., 758 F. Supp. 258 (E.D. Pa. 1991) (Pennsylvania federal district court adopting *In re Paoli* standard).

THE JUDGE WHO ABSTAINED IN *PLESSY v. FERGUSON*: JUSTICE DAVID BREWER AND THE PROBLEM OF RACE

*J. Gordon Hylton**

The final line of the United States Supreme Court opinion in the landmark case of *Plessy v. Ferguson* states, "Mr. Justice Brewer did not hear the argument or participate in the decision of this case."[1] Because of the untimely death of his daughter, the 58-year old Justice had been forced to leave Washington, D.C. for his home in Leavenworth, Kansas, on April 13, 1896, the day *Plessy* was argued before the Court.[2] Without Brewer, the Court voted 7 to 1 to uphold Louisiana's "separate but equal" public accommodations law. Only Justice John Marshall Harlan, a former slaveholder from Kentucky, agreed that the challenged "Jim Crow" statute violated the Fourteenth Amendment's guar-

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[1] 163 U.S. 537, 564 (1896). On *Plessy v. Ferguson* generally, see C. VANN WOODWARD, *The Case of the Louisiana Traveler*, QUARRELS THAT HAVE SHAPED THE CONSTITUTION 145-58 (J. Garraty ed. 1964) and C. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987).

[2] Francis Adele Brewer died of tuberculosis in Texas where she and her mother had moved the previous year in hope that the climate would improve her health. Wasington Post, April 14, 1896 at 3; *see also*, H. KARRICK, DAVID JOSIAH BREWER: A BIOGRAPHICAL SKETCH BY HIS DAUGHTER (1912) (available at Yale University Library in collection of Brewer Family Papers). Because of his involvement with an international commission appointed to resolve a boundary dispute between Venezuela and British Guinea, it is possible that Brewer would have missed the argument anyway. *See infra* note 103.

antee of equal protection of the laws.[3]

A general familiarity with the personal background and constitutional views of David Josiah Brewer might have led one to believe that had the Kansan been present, he would have joined in Harlan as a second vote against the challenged ordinance. The son of an abolitionist clergyman, Brewer had enlisted in the cause of antislavery as a youth, and in 1858, at age 21, had joined the migration of antislavery New Englanders to "Bloody Kansas."[4] As a judge in Reconstruction era Kansas, he had authored one of the first judicial opinions upholding the right of an African-American citizen to vote in a general election, and as the superintendent of schools in Leavenworth, he had helped establish the first schools for blacks in the state. Furthermore, since joining the United States Supreme Court in 1890, he had been a vocal supporter of African-American advancement in his pronouncements off the bench. In an 1892 address to the American Home Missionary Society, for example, Brewer had proclaimed, "This is not an Anglo-Saxon, not a Teutonic, not even a Cauca-

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[3] Harlan's eloquent defense of the civil rights of African-Americans in the late nineteenth and early twentieth centuries is one of the best known chapters in the history of the United States Supreme Court. It is ironic that on a court composed largely of northerners who either participated in or came of age during the American Civil War the one clear voice in favor of a racially egalitarian society was that of a former Kentucky slaveholder who, before his appointment to the nation's highest tribunal, had opposed the ratification of both the Thirteenth and Fourteenth Amendments. For a discussion of Harlan's views on race and civil rights, see Westin, *John Marshall Harlan and the Constitutional Rights of Negroes*, 66 YALE L.J. 637 (1957).

[4] There is, unfortunately, no biography of Brewer. This absence is explained in large part by the failure of Brewer to leave behind any substantial body of private papers. The existing Brewer papers are collected in the Brewer Family Papers, Yale University Library, New Haven, Connecticut. A small collection of his papers (64 items) can also be found in the Library of Congress. Unless otherwise noted, biographical information in this article is derived from materials in the Brewer Family Papers.

There are many secondary sources which address various aspects of Brewer's career. *See, e.g.*, Bergan, *Mr. Justice Brewer: Perspective of a Century*, 25 ALB. L. REV. 191 (1961); R. CUSHMAN, 2 DICTIONARY OF AMERICAN BIOGRAPHY 22 (D. Malone ed. 1928); Eitzen, *David Brewer, 1837-1910: A Kansan on the United States Supreme Court*, 12 THE EMPORIA STATE RESEARCH STUDIES 1 (1964); O. FISS, *David J. Brewer: The Judge as Missionary*, in THE FIELDS AND THE LAW 53-63 (1986); Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 VAND. L. REV. 615 (1965); A. PAUL, 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1967, AT 1515 (L. Friedman & F. Israel eds. 1969); L. Lardner, The Constitutional Doctrines of Justice David Josiah Brewer (1938) (unpublished Princeton University Ph.D. dissertation).

sian nation. The blood of all races mingles in that of the American people."[5]

Moreover, Brewer had exhibited great sympathy for other "minority" groups. He was the Court's foremost spokesman for the rights of Asians residing in the United States, siding with the Oriental party in eighteen of twenty-three cases decided by the United States Supreme Court during his tenure.[6] (The Court itself found for the Oriental party in only six of these cases.[7]) He was also a supporter of women's rights, at least as the term was

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[5] *Address of Mr. Justice Brewer,* MINUTES OF THE SIXTY-SIXTH ANNUAL MEETING OF THE AMERICAN HOME MISSIONARY SOCIETY 95 (1892).

[6] *See* Tang Tun v. Edsell, 214 U.S. 523 (1909); Liu Hop Fong v. United States, 209 U.S. 453 (1908); Chin Yow v. United States, 208 U.S. 8 (1908); Ah Sin v. Wittman, 198 U.S. 500 (1905); United States v. Ju Toy, 198 U.S. 253 (1905); United States v. Sing Tuck, 194 U.S. 161 (1904); Tom Hong v. United States, 193 U.S. 517 (1904); Ah How v. United States, 193 U.S. 65 (1905); The Japanese Immigrant Case, 189 U.S. 86 (1903); Chin Bak Kan v. United States, 186 U.S. 193 (1902); Lee Lung v. Patterson, 186 U.S. 168 (1902); Fok Yung Yo v. United States, 185 U.S. 296 (1902); United States v. Lee Yen Tai, 185 U.S. 213 (1902); Li Sing v. United States, 180 U.S. 486 (1901); United States v. Gue Lim, 176 U.S. 156 (1900); United States v. Wong Kim Ark, 169 U.S. 649 (1898); Lem Wong King Ark, 169 U.S. 649 (1898); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Lau Ow Bew v. United States, 144 U.S. 47 (1892); Nishimura Ekiu v. United States, 142 U.S. 651 (1892); *In re* Lau Ow Bew, 141 U.S. 583 (1891); Wan Shing v. United States, 140 U.S. 417 (1891); Quock Ting v. United States, 140 U.S. 417 (1891). Brewer did not participate in Wang Wing v. United States, 163 U.S. 228 (1896). In three additional decisions, the Court did not issue written opinions but instead disposed of the cases by summary affirmance or dismissal. *See* Goon Shung v. United States, 212 U.S. 566 (1909); Chinese Cases, 165 U.S. 275 (1897); Chinese Cases, 140 U.S. 676 (1891).

At the time of the *Plessy* argument, Brewer had sided with the Asian position in six of seven cases. In four of these cases, he was in dissent.

[7] *See In re* Lau Ow Bew, 141 U.S. at 583; Lau Ow Ben, 144 U.S. at 47; Gue Lin, 176 U.S. at 156; Tom Hong, 193 U.S. at 517; Chin Yow, 208 U.S. at 8; and Liu Hop Fong, 209 U.S. at 453. Brewer sided with the Oriental party in 78.3% of the cases in which the court issued a written opinion. Of his colleagues on the Court between 1890 and 1910, only Rufus Peckham consistently supported Brewer's position, doing so in 76.5% of the cases in which he participated (13 of 17). No other Justice's percentage exceeded 50.0%, although Stephen Field did support the Oriental position in 4 of 8 cases. Chief Justice Melville Fuller most perfectly represented the Court's sentiment, voting in the majority in all 24 cases decided in this twenty year period (six times favoring the Chinese/Japanese position and eighteen times opposing it). Harlan, on the other hand, was slightly less sympathetic to this position than the court as a whole, supporting the Oriental position in only 5 of 23 cases (21.7%). The records of Brewer's other contemporaries on the court are as follows: Bradley, 2 of 5; Gray, 4 of 11; Blatchford, 2 of 6; Lamar 2 of 5; Brown, 5 of 22; Shiras, 2 of 11; Jackson 0 of 1; White, 4 of 17; McKenna, 3 of 15; Holmes, 2 of 8; Day 3 of 8; and Moody, 1 of 2. Neither Justices Miller or Lurton participated in such a case during the brief time they sat with Justice Brewer.

understood in his era. As a judge in Kansas in the 1870's, he had supported the right of women to hold property in their own names and had upheld their right to serve as school supervisors.[8] While a member of the Supreme Court, he publicly supported women's suffrage and called for an increased role for women in the professions.[9] In a 1905 speech at Vassar College, Brewer endorsed the idea of a woman President and suggested that social worker Jane Addams would make an excellent mayor of Chicago.[10] Moreover, in one of his best known Supreme Court opinions, *Muller v. Oregon*,[11] he departed from his long-standing opposition to legislative interference in the labor market to uphold the constitutionality of protective legislation for women workers.

Brewer was also an outspoken supporter of a variety of what were in his era viewed as "liberal" causes. He was a life-long advocate of world peace and a crusader for the cause of international arbitration.[12] He served for years as an officer of the American Missionary Association; he was an active supporter of the Associated Charities in Washington, D.C., and he was a devout member of the Congregational Church.[13] In the late 1890's he would emerge as an outspoken opponent of United States imperialism, a critic of the war with Spain, and an advocate of immediate independence for the Philippines.[14]

Furthermore, of all the men who sat on the United States Supreme Court in the late nineteenth and early twentieth centuries, none was more vocal than Brewer, both on and off the bench, in his support of the cause of individual liberty. He be-

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[8] H. KARRICK, *supra* note 2, at 24.

[9] *Women's Suffrage: Its Present Position and Its Future*, 30 THE LADIES WORLD 6 (1909). *See generally*, J. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 221 (1978).

[10] Address by Justice Brewer to Vassar College on Women, Changed Relations to Life and Society (1893) (available at Yale University Library in collection of Brewer Family Papers). *See also, Women in the Professions*, THE DELINEATOR (May 1906).

[11] 208 U.S. 412 (1908).

[12] For Brewer's efforts on behalf of international cooperation, see Butler, *Melville Weston Fuller-David Josiah Brewer, Memorial Note*, 4 AM. J. INT'L L. 909 (1910).

[13] Brewer was involved in both charitable and liberal "causes." *See, e.g.*, R. CUSHMAN, *supra* note 4, at 23; K. MORTON, DAVID JOSIAH BREWER (1912) (available at Yale University Library in collection of Brewer Family Papers).

[14] Brewer, *The Spanish War: A Prophecy or an Exception*, in 16 KANSAS COLLECTED SPEECHES AND PAMPHLETS 16-17 (n.d.).

lieved that liberty of contract was a right protected by the Constitution; he favored a narrow interpretation of the state police power; and he rejected the concept of a paternalistic state. These positions seemingly clashed with the efforts at social engineering that lay behind the emerging regime of legally-mandated segregation that was emerging in the American South at the end of the nineteenth century.[15] Brewer was also not reluctant to stake out a position at odds with that of his colleagues. He was the greatest dissenter of his era, breaking with the majority on 226 occasions during his twenty years on the court.[16] He dissented, on average, 11.3 times per term, a rate greater than any of his colleagues, including Harlan, the so-called great dissenter.[17] Furthermore, Brewer did not limit his remarks to the Court's official utterances. His private papers contain the texts of more than 100 public orations and magazine articles composed while on the Court.[18] He was, according to the *Virginia Law Register* (a legal journal for the practicing bar), a justice who "mingled with the people and addressed his countrymen . . . upon matters concerning the general welfare," and who "did not hesitate to express vigorous opinion upon all the great questions of the day and with vigorous rhetoric . . . lashed the

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[15] *See infra* notes 75-98.

[16] A. Blaustein & R. Mersky, The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States 144 (1978). Brewer wrote dissenting opinions in 57 of the 226 cases in which he dissented. He also wrote the majority opinion in 533 cases, 70 of which involved constitutional issues. He also concurred in 44 majority opinions, writing separate opinions in 8 of them. Cushman provides slightly different figures, i.e., 526 majority opinions, 38 concurrences including 8 separate opinions, 215 dissents, and 53 dissenting opinions including 18 which dealt with constitutional issues. R. Cushman, supra note 4, at 24,

[17] Harlan dissented, on average, in 11.1 cases per term. Of the other seventeen justices whose terms on the Court overlapped with Brewer, only Rufus Peckham (10.9) and Edward White (10.7) averaged more than 10 dissents per term. Samuel Blatchford dissented with the least frequency, averaging less than one dissent (0.7) per term during his eleven year career. *See* A. Blaustein & R. Mersky, *supra* note 16, at 148.

[18] The Brewer Family Papers contain approximately eighty public addresses and nearly fifty articles, the vast majority of which were written during his two decades on the Supreme Court. K. Morton, Introduction to Brewer Family Papers 2 (1912) (available at Yale University Library in collection of Brewer Family Papers). A six-page list of Brewer's extracurricular writings while on the Court, many of which were originally delivered as public orations, can be found in L. Lardner, *supra* note 4, at 226-31.

abuses of legal processes and the chicanery of lawyers."[19]

In spite of all the reasons that might lead one to expect Brewer to be sympathetic to the claims of African-American citizens, his voting record in civil rights cases hardly justifies such a conclusion. During his twenty year tenure, the Supreme Court handed down decisions in thirty cases involving the civil rights of African-Americans.[20] Not surprisingly, the defenders of African-American rights and liberties were generally unsuccessful, prevailing in only five of the thirty cases.[21] Brewer participated

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[19] 16 VA. L. REGISTER 65 (1910). Brewer's penchant for publicly voicing his disagreements with his colleagues was not always appreciated by his brethren on the bench. Oliver Wendell Holmes, Jr., who served with Brewer from 1902 to 1910, observed that while Brewer "was a very pleasant man in private," he "had the itch for public speaking and writing and made me shudder many times. I have heard him speak in public with a curious bitterness about some of the decisions of his brethren that he disagreed with." 1 HOLMES-POLLACK LETTERS 160 (M. Howe ed. 1941). In the same letter, written shortly after Brewer's death, Holmes also noted, "I had to remind myself that one should not allow taste to blind one to great qualities, as it is apt to." *Id.* Mr. Dooley, the popular creation of Finley Peter Dunne, was also less than enamored with Brewer's proclivity toward public speaking, although he did at least acknowledge his prominence. *See* Dunne, *College and Degrees—Justice at Yale*, in MR. DOOLEY AND THE CHOICE OF LAW 52-57 (1963).

[20] *See* Marbles v. Creecy, 215 U.S. 63 (1909); United States v. Shipp (II), 214 U.S. 386 (1909); Thomas v. Texas, 212 U.S. 278 (1909); Bailey v. Alabama, 211 U.S. 452 (1908); Berea College v. Kentucky, 211 U.S. 45 (1908); United States v. Shipp (I), 203 U.S. 563 (1906); Hodges v. United States, 203 U.S. 1 (1906); Martin v. Texas, 200 U.S. 217 (1906); Riggins v. United States, 199 U.S. 547 (1905); Clyatt v. United States, 197 U.S. 207 (1905); Jones v. Montague, 194 U.S. 147 (1904); Giles v. Teasley, 193 U.S. 146 (1904); Rogers v. Alabama, 192 U.S. 226 (1904); James v. Bowman, 190 U.S. 528 (1903); Giles v. Harris, 189 U.S. 475 (1903); Brownfield v. South Carolina, 189 U.S. 426 (1903); Tarrance v. Florida, 188 U.S. 519 (1903); Cummings v. County Board of Education, 185 U.S. 528 (1903); Chesapeake & Ohio Ry. v. Kentucky, 179 U.S. 388 (1900); Carter v. Texas, 177 U.S. 442 (1900); Williams v. Mississippi, 170 U.S. 213 (1898); Plessy v. Ferguson, 163 U.S. 537 (1896); Murray v. Louisiana, 163 U.S. 101 (1896); Charley Smith v. Mississippi, 162 U.S. 592 (1896); Mills v. Green, 159 U.S. 651 (1895); Andrews v. Swartz, 156 U.S. 651 (1895); *In re* Shibuya Jugiro, 140 U.S. 291 (1891); *In re* Wood, 140 U.S. 278 (1891); Louisville, New Orleans, & Texas Ry v. Mississippi, 133 U.S. 587 (1890).

[21] *See* United States v. Shipp, (II), 214 U.S. 386 (1909); United States v. Shipp, (I), 203 U.S. 563 (1906); Riggins v. United States, 199 U.S. 547 (1905); Rogers v. Alabama, 192 U.S. 276 (1904); Carter v. Texas, 177 U.S. 442 (1900). One could argue that black Americans gained little from these decisions. *Carter*, *Rogers*, and *Shipp* (I) dealt with the right of an African-American criminal defendant to present evidence that blacks had been systematically excluded from the jury that had convicted him. In each, the decision of the Court was unanimous. In *Shipp* (II), which addressed the power of federal courts to hold members of lynch mobs and compliant law enforcement officials in contempt of court, a six-judge majority (including Brewer) affirmed the existence of such power. The

in twenty-nine of these cases, and in only six did he side with the African-American position.[22] On only one occasion did he do so in dissent.[23] Nor was Brewer a quiet participant in the actions

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three dissenters (Edward White, Rufus Peckham, and Joseph McKenna) differed only as to the issue of the power of the federal court to hold a sheriff and his deputies in contempt for their failure or unwillingness to stop the mob. *Riggins* dealt with the power of federal courts to issue writs of habeas corpus for white members of lynch mobs who had been arrested by federal authorities. The Supreme Court unanimously ruled that this was an improper remedy.

[22] As the following breakdown of judicial voting in these cases illustrates, with the exception of Harlan and Day, Brewer's contemporaries exhibited little sympathy for such claims.

Individual Voting, United States Supreme Court Decisions Involving African-American Civil Rights, 1890-1910

Justice	Yrs. on Ct.	Cases	Pro-Civil Rts.	Pct.
Harlan	1890-1910	29	15	51.7%
Day	1903-1910	17	7	41.2%
Bradley	1890-1892	3	1	33.3%
Moody	1906-1910	4	1	25.0%
Holmes	1902-1910	17	4	23.5%
Brown	1891-1906	22	5	22.7%
McKenna	1898-1910	19	4	21.7%
BREWER	1890-1910	29	6	20.1%
Fuller	1890-1910	30	5	16.7%
Peckham	1895-1909	24	4	16.7%
White	1894-1910	27	4	14.8%
Shiras	1892-1903	10	1	10.0%
Gray	1890-1902	11	1	19.1%
Field	1890-1897	9	0	0.0%
Miller	1890	1	0	0.0%
Jackson	1893-1895	0	0	—
Lurton	1909-1910	0	0	—
Totals	1890-1910	30	5	16.7%

Note: The above percentages are distorted somewhat by the fact that four of the five pro-civil rights decisions were handed down between 1904 and 1909. There is little reason to believe that any of these cases would have been decided differently had they arisen between 1890 and 1904. The percentages for only five justices—Harlan, Day, Brown, Brewer, and Bradley—exceeded that for the Court as a whole during their years on the Supreme Court.

[23] Brewer's dissenting opinion came in Giles v. Harris, 189 U.S. 475 (1903). His five other pro-African-American votes came in the five cases cited in note 21. Of course, dissents in such cases were extremely rare. Other than Brewer, only four justices ever dissented on behalf of unsuccessful civil rights claimants during Brewer's tenure. Harlan dissented in nine cases: Bailey v. Alabama, 211 U.S. 452 (1908); Berea College v. Kentucky, 211 U.S. 45 (1908); Hodges v. United States, 203 U.S. (1906); Clyatt v. United States, 197 U.S. 207 (1905); Giles v. Teasley, 198 U.S. 146 (1904); James v. Bowman, 190

of the Fuller Court majority. In seven of the twenty-five cases in which African-American civil rights claims were rejected, Brewer authored the majority opinion.[24] Perhaps the most telling fact of all is that Harlan was willing to concur in only one of Brewer's seven majority opinions.[25]

From the vantage point of the late twentieth century, Brewer's votes in these cases make him appear highly inconsistent, if not hypocritical. On the one hand, he was able to incorporate a special concern for the civil rights of Chinese into his constitutional views, even though such a view put him at odds with most of his colleagues and with prevailing popular opinion. On the other, he seemed unable to develop a comparable view of the rights of African-Americans, even though his off-the-court activities suggested that he would be sympathetic to such a view and even though his friend and colleague Harlan had paved the way for a position years before Brewer joined the Court.[26] Brewer's apparent inability to square his general beliefs with his votes as a Supreme Court Justice is evidence of the intractable nature of the problem posed by the institutionalization of racial segregation in turn-of-the-century America. To fully understand the accommodation that Brewer finally worked out, one has to begin with his pre-Civil War experiences as a son of the Greater New England culture.

U.S. 127 (1903); Giles v. Harris, 189 U.S. 407 (1903); Plessy v. Ferguson, 163 U.S. 537 (1896); Louisville, New Orleans, & Texas Ry. v. Mississippi, 133 U.S. 597 (1890). He was joined by William Day in three of these cases: Hodges v. United States, 203 U.S. 1 (1906); Berea College v. Kentucky, 211 U.S. 45 (1908); Bailey v. Bowman, 190 U.S. 528 (1903). He was joined by Henry Brown in two: Giles v. Harris, 189 U.S. 475 (1903); James v. Alabama, 211 U.S. 45 (1908). He was joined by Joseph Bradley in Louisville, New Orleans, & Texas Ry. v. Mississippi, 133 U.S. 587 (1890).

[24] *See* Berea College v. Kentucky, 211 U.S. 45 (1908); Hodges v. United States, 203 U.S. 1 (1906); Clyatt v. United States, 197 U.S. 207 (1905); Jones v. Montague, 194 U.S. 147 (1904); Tarrance v. Florida, 188 U.S. 519 (1903); and Louisville, New Orleans & Texas Ry. v. Mississippi, 133 U.S. 587 (1890).

[25] The one case was Jones v. Montague, 194 U.S. 147 (1904) (discussed at length in text accompanying note 126). In *Tarrance*, Harlan did not attend the oral argument and did not take part in the decision of the case. In the other five cases, he dissented.

[26] Westin, *supra* note 3 at 638. Harlan had first taken this position in his dissent in the Civil Rights Cases, 109 U.S. 3, 26 (1883).

David Brewer and Civil Rights, 1837-1890

Although he spent his entire adult life in Kansas and Washington, D.C., Brewer was a product of the reform-oriented culture of antebellum New England. His father, Josiah Brewer (1796-1872), was a Congregationalist minister who had been educated at Phillips Academy, Yale, and Andover Theological Seminary and who had, in the late 1820's, undertaken an educational mission to Smyrna, Asia Minor. It was there, on June 20, 1837, that David Josiah Brewer was born. Brewer's mother, Emilia Ann Field Brewer, was a member of one of the most illustrious families in America. Her father was the Reverend David Dudley Field, Sr. Her brothers included David Dudley, Jr., the author of the Field Code and one of the premier American lawyers of his era; Cyrus, the entrepreneur who laid the Atlantic cable, Henry, a noted clergyman, editor, and author, and Stephen, who would rise to prominence as a member of the California Supreme Court and, after 1864, as a justice on the United States Supreme Court. In fact, Stephen was living with the Brewers in Smyrna at the time of David's birth, and 53 years later they were to be reunited as colleagues on the Supreme Court.

A cholera epidemic and a decline in financial support for their mission forced the Brewers to return to Connecticut in 1838, at which point the elder Brewer accepted a position as a prison chaplain that he was to hold until 1841. Josiah Brewer's ministry took him from one Connecticut town to another over the next fifteen years, during which time he became an active crusader for a variety of liberal causes including prison reform, pacifism, and, most importantly, anti-slavery. Although little is known of David Brewer's early life, he was apparently profoundly influenced by his father's strict Congregationalism and his support for social reform. In his later life, Brewer would regularly speak with pride about his New England reform heritage, on one occasion stating, "I glory in the fact that my father was an old-line abolitionist, and one thing which he instilled into my youthful soul was the conviction that liberty, personal and political, is the God-given right of every individual, and I expect to

live and die in that faith."[27]

In 1852, the fifteen-year-old Brewer enrolled in Wesleyan College in Middletown, Connecticut. Two years later, he transferred to Yale, his father's alma mater. In 1856, he graduated with honors, ranking fourth in a class of ninety-seven which included Henry B. Brown, another future colleague on the United States Supreme Court. He then spent a year clerking in the New York City law office of his uncle, David Dudley Field, after which he enrolled in the Albany Law School.

It was during this period of law study that Brewer himself publicly embraced the cause of anti-slavery. In a letter to a Massachusetts newspaper, the *Middlesex Republican*, in early 1857, he denounced the outgoing administration of President Franklin Pierce as "a failure and a curse to the country" and blamed Pierce personally for the ongoing civil war in Kansas between pro and anti-slavery forces. In regard to his fellow New Englander—Pierce was from New Hampshire—he wrote: "Never in our annals has there been presented a sadder picture of imbecility, spurred on by overriding ambition."[28]

A subsequent edition of the paper carried a letter from a reader criticizing the intemperance of Brewer's remarks, but the editor defended Brewer's actions. Ironically, the same issue of the paper also carried a story announcing the United States Supreme Court decision in *Dred Scott v Sandford*.[29] In a follow up letter, Brewer ignored his critic and instead attacked the controversial Supreme Court opinion, referring to it as "that last great satire on Constitutional logic." Although he criticized the Court's majority for deciding the case on broader grounds than were necessary, the central focus of his attack was Chief Justice Taney's assertion that African-Americans were not citizens of the United States and never had been. Brewer wrote:

> Without commenting on the injustice of this striking out from the rolls of citizenship, so large a body of our fellow citizens,

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[27] Brewer, *The Spanish War: A Prophecy or an Exception*, in 16 KANSAS COLLECTED SPEECHES AND PAMPHLETS 16-17 (n.d.) *quoted* in Eitzen, *supra* note 4, at 53-54.

[28] Middlesex Republican (undated clipping included in Brewer scrapbook in collection of Brewer Family Papers).

[29] 60 U.S. (19 How.) 393, 469 (1857).

> whose ancestors shared with ours the trials and honors of the Revolution, we assert that the Constitution was framed to secure the blessings of freedom and citizenship to all who wished them, and though its authors were compelled to bend a little to peculiar interests, they laid the foundation and bade America prepare for universal citizenship.[30]

Other contributions to the *Middlesex Republican* by Brewer included a letter that argued on behalf of the United States Congress' power to prohibit slavery in the territories and a lengthy anti-slavery poem, entitled "Dred Scott."[31]

In the spring of 1858, Brewer received his law degree and was admitted to the New York bar. At this point, he made a decision that would shape his future career. Rather than return to New York City to practice law with his already famous uncle, David Dudley Field, the twenty-one year old Brewer decided to follow the example of his uncle Stephen and move west, specifically to Kansas.[32] His motives appear to have been a combination of youthful idealism and the desire to secure fame and fortune in a new land. He departed for Kansas City in 1858, arriving at the peak of the hostilities between pro-slavery and anti-slavery Kansans. Shortly thereafter, Brewer left Kansas City on a prospecting expedition to Colorado in search of gold. When the venture failed, he returned to the East. His visit was brief, however, and in the fall of 1859, he returned to Kansas and settled in Leavenworth, a city that would be his home until his appointment to the United States Supreme Court thirty

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[30] *See* E. FEHRENBACHER, THE DRED SCOTT CASE 417-48 (1978).

[31] These items are available at Yale University Library in Justice Brewer's scrapbook included in the collection of Brewer Family Papers. Brewer's scrapbook from this period of his life reflects an intense interest in poetry. Many of its pages are given over to clippings of poems written by others. Page one of the scrapbook includes two poems by Longfellow, one by Bryant, one by Poe ("Annabel Lee"), the Lord's Prayer, and an article on Kansas. The *Middlesex Republican* also published "Evening at Nahant," a non-political poem by Brewer.

[32] The exact reasons for Brewer's decision to relocate to Kansas are not known. Later in life, Brewer claimed that he decided to forego practice in New York City for fear he would always be known as the nephew of David Dudley Field. Family rumor had it, however, that David Dudley Field was unimpressed by Brewer's prospects for success in the law in New York and encouraged him to seek his fortune in the West. L. Lardner, *supra* note 4, at 53.

years later.

The attention of the young Brewer had been focused on Kansas for some time. His scrapbook, begun in 1856, contains a newspaper story on Republican William Seward's "Bill for the Admission of Kansas into the Union" on its first page, and numerous other articles on Kansas, collected between 1856 and 1859, are included. As his sister later recalled, "We should have been surprised when David decided to go west, had he thought of elsewhere than in Kansas."[33] Throughout his life, Brewer celebrated the early anti-slavery efforts in his adopted state, comparing John Brown to John the Baptist and designating Brown as the forerunner of Abraham Lincoln.[34] Although his sympathies were clearly with the anti-slavery forces, the subsiding of hostilities at the end of 1859 allowed him to avoid most of the violence of "Bleeding Kansas" and to concentrate instead on the more mundane task of establishing a law practice.

In spite of his education and prestigious family, Brewer's initial efforts in Leavenworth met with very limited success. When a sufficient number of clients failed to materialize, he turned to public service, filling a variety of governmental positions in his early years in Leavenworth. Initially a notary public, he was appointed commissioner of the Federal Circuit Court in Leavenworth in 1861 and was later elected judge of the county probate court. In 1865, he was elected judge of the first judicial district of Kansas, and the same year assumed the position as Superintendent of Schools for the city of Leavenworth. His only political setback came in 1863 when he failed to obtain the Republican nomination for a seat in the state legislature.

It was in Kansas in the late 1860's that Brewer first dealt directly with the issue of the African-American citizenship, a concept that he had whole-heartedly endorsed in his pre-Civil War attack on the *Dred Scott* decision. Shortly after his election to the district court bench, he was required to interpret Section 1, Article V of the Kansas Constitution which limited the right to vote to white males. In *Morris v. McHale, Rapine, and Har-*

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[33] H. KARRICK, *supra* note 2, at 57.

[34] Brewer, *Some Thoughts About Kansas*, in TWELFTH ANNUAL MEETING OF THE BAR ASSOCIATION OF THE STATE OF KANSAS 61 (1895).

ris,[35] John Morris, a thirty-seven year old male whose father was white and whose mother was three-quarters black, had attempted to register to vote but had been barred from doing so by local officials because of his race. In a decision that struck a blow for racial egalitarianism, Brewer ruled that Morris did indeed have the right to vote. Brewer rested his holding upon a series of propositions. First, he held, "the theory of our government is universal [manhood] suffrage." Second, laws are presumed to be "humane and just" unless convincing evidence exists that the legislature intended the contrary. (Implicit in this proposition was the view that to deny someone the vote would be inhumane and unjust.) Finally, Brewer noted that the Kansas Constitution referred to race, not color, and that Morris was more of the white race than the black.

Brewer did not, however, claim that the provision in the state constitution was invalid. Given that the Fourteenth Amendment (and possibly the Thirteenth as well—the exact date of the case is not recorded) had not yet been adopted, it is hard to see how he could have, even if he had so desired. Consequently, he did acknowledge that individuals of undiluted African heritage were not entitled to vote under the Kansas Constitution.

Brewer's early years in Leavenworth may also have been the first time in his life that he had the opportunity to interact with African-Americans on a regular basis. By all accounts his personal relations with his black neighbors were warm and heartfelt, although his attitude toward them seems highly paternalistic. He embraced the cause of African-American education shortly after his arrival in Kansas, but his affectionate description of black pupils as "juvenile Ethiopians" suggests that he thought of Leavenworth's African-Americans as something less than social equals.[36] The nature of Brewer's attitude can be

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[35] This case is unpublished but an unidentified newspaper report of the case is contained in Justice Brewer's scrapbook, No. 2, p. 10 in the Brewer Family Papers. The case was apparently decided in 1865, but prior to the ratification of the thirteenth amendment; at least, there is no reference of the amendment in the newspaper report of the case.

[36] SECOND ANNUAL REPORT OF THE SUPERINTENDENT OF PUBLIC SCHOOLS OF LEAVENWORTH CITY, KANSAS 18 (1866) [hereinafter SECOND ANNUAL REPORT].

gleaned from a story related by Arthur Simmons, a white cigar maker in Leavenworth. Harking back to the late 1870's when Brewer was a Kansas judge, Simmons recalled:

> One day Justice Brewer was in the store, talking to me, when an old negro came in, who had been janitor at the court house ten years before, when Brewer was District Judge. Neither the Justice nor the negro recognized the other. The negro bought a bit of smoking tobacco, and started shuffling out.
> Then I told Brewer who he was. "What!" he exclaimed, "Is that Uncle Ebe? Heavens, how he has aged!" Then he went over and stopped the old man. "Uncle Ebe," he said, "don't you recognize me?" The negro looked at him blankly for a second, then his face became positively radiant.
> 'Fo de Lord, it's Marse David!" he exclaimed, and reached out his two hands and took those of Brewer. Then Justice Brewer stood there shaking hands with him and recalling old times in the court house for I don't know how long.[37]

Brewer's most direct and most significant involvement with the African-American population of Leavenworth came in his capacity as Superintendent of Public Schools in Leavenworth. He had become involved with public education shortly after his arrival in Kansas, and in May of 1864, he was chosen as vice president of the local board of education. In this capacity he was instrumental in the establishment of the first two public schools for African-Americans in Leavenworth (which were apparently the first such schools in the state.)[38] In November of 1864, he assumed the office of president of the board and in August of 1865, he became superintendent of schools, a position he held until 1868 when he was elected president of the state teachers

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[37] H. KARRICK, *supra* note 2, at 57.

[38] SECOND ANNUAL REPORT, *supra* note 36, at 14. Brewer claimed that the Leavenworth schools were the first public schools for African-Americans in Kansas in a public address delivered shortly after the turn-of-the-century. *See infra* note 171. Other evidence seems to support this claim. Working with H. D. McCarty, another of the pioneers of public education in Kansas, Brewer helped secure $25,000 for the construction of public school buildings for both races in Leavenworth. C. WRIGHT, ONE HUNDRED YEARS IN KANSAS EDUCATION 18 (1963). Of Brewer's colleague McCarty, the historian of public education in Kansas has written, "with equal enthusiasm, he promoted Negro education in the established schools of Kansas." *Id.*

association.[39] As superintendent, he proudly reported on the progress of the "colored" schools, including the establishment of a third school during the 1865-66 school year. In 1867, he noted with approval that virtually all of the city's African-American children under age sixteen had attended school for at least part of the year.[40]

There is no evidence, however, that Brewer believed that black and white children should be educated in the same schools. Although the "General Regulations of the Schools" in force during the years 1865 to 1868 made no reference to the assignment of pupils by race, Brewer's superintendent's reports refer to "white schools" and "colored schools" as general categories without comment of the appropriateness of the division.[41] In his 1866 report, he applauded the decision of the citizens of Leavenworth to appropriate $20,000 for the construction of a separate brick school house for the white and colored pupils.[42]

In 1869, Brewer stepped down from his position as state district court judge and assumed the position of Leavenworth City Attorney. However, he was back on the bench the following year when he was elected to the first of three six-year terms on the Kansas Supreme Court. Eleven years later, while a member of Kansas' highest court, Brewer had the occasion to rule on the legality of a system of segregated schools similar to the one he had helped establish in Leavenworth. In *Board of Education v. Tinnon*,[43] an African-American parent challenged the legality of the decision of the board of education of Ottawa, Kansas, to establish separate schools for black and white children. Tinnon apparently argued that the Ottawa Board of Education lacked the authority to establish such a system under the Kansas Gen-

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[39] L. Lardner, *supra* note 4, at 10.

[40] Third Annual Report of the Superintendent of Public Schools of Leavenworth City, Kansas 17 (1867). At this time, African-Americans accounted for approximately 18% of school age children in Leavenworth.

[41] Second Annual Report, *supra* note 36, at 75-76.

[42] *Id.* at 18. Brewer's primary point of course was not to endorse the concept of segregated schools, but to congratulate his fellow townsmen on their decision to fund new, brick schools and for their willingness to extend their largess to the town's African-American pupils who accounted for approximately one-sixth of the school age population.

[43] 26 Kan. 1 (1881).

eral Education Act and that such a system was prohibited by the Fourteenth Amendment to the United States Constitution, ratified in 1870. The trial judge agreed and issued a writ of *mandamus* compelling the admission of the plaintiff's children to the nearest school, which in this case was the white school. The Board then appealed to the Kansas Supreme Court.

By a two-to-one vote, the Kansas Supreme Court upheld the ruling of the lower court, but with Justice Brewer in dissent. The two judge majority based its ruling exclusively on the grounds that the local board of education could exercise *only* those powers explicitly granted to it by the General Education Act. Since the statute was silent on the issue of racial segregation, the majority reasoned, the Ottawa Board had no authority to establish a dual school system. The issue of what the fourteenth amendment required was specifically left unresolved.

Brewer dissented on both state and federal grounds. First of all, he did not believe that the power of localities to establish separate schools for the races rested on specific authorization from the state legislature. Moreover, he found that the fourteenth amendment imposed no barrier to separate schools. As he put it, "I dissent entirely from the suggestion that under the 14th Amendment of our Federal Constitution, the State has no power to provide for separate schools for white and colored children. I think, notwithstanding such amendment, each State has the power to classify school children by color, sex, or otherwise, as to [sic] its legislature shall deem wisest and best."[44]

Brewer's dissent in *Tinnon* is a difficult opinion to evaluate. To say that Brewer was indifferent to the plight of African-Americans would be to ignore his early work of behalf of black education. It may well be that his own extensive experience in this area led him to believe that, given contemporary racial attitudes, the inability to establish separate schools would frustrate the development of public education in the state.[45] A belief that

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[44] *Id.* at 23-24.

[45] The potential for conflict over the issue of interracial schools was exacerbated by the Kansas legislature's adoption of a compulsory attendance law in 1874. Morris, *One State's Struggle with* Wisconsin v. Yoder: *the Kansas Compulsory School Attendance Statute and the Free Exercise of Religion*, 17 WASHBURN L.J. 574 (1978) (citing 1874 Kan. Sess. Laws ch. 123, § 1, 194-95).

African-Americans, only recently removed from slavery, needed special help to enter American society and that that special help could be best dispensed in black-only schools was not necessarily inconsistent with Brewer's earlier expressions of support for the black race.[46]

Moreover, Brewer was almost certainly correct that the fourteenth amendment was not commonly understood in 1881 to have "outlawed" racially separate schools.[47] While individual spokesmen for that position did exist, in the nineteenth century no state supreme court or federal court ever held that the fourteenth amendment categorically prohibited racially segregated schools.[48] The *Tinnon* majority, for example, shied away from such a holding, choosing instead to invalidate the city ordinance on much narrower grounds of statutory construction.[49] Even Justice Harlan, the great defender of African-American civil rights, apparently accepted the constitutionality of separate schools.[50]

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[46] Brewer's ambivalence on this issue was characteristic of Kansans of his era. State laws pertaining to racial segregation in schools were changed seven times between 1870 and 1881. According to the historian J. Morgan Kousser, "the shifts in the legal status of blacks in public education in the Jayhawk State were so frequent and dramatic that they can be followed only with a tabular guide." Kousser, *Before* Plessy, *Before* Brown: *The Development of the Law of Racial Integration in Louisiana and Kansas* in TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 221 (P. Finkelman & S. Gottlieb eds. 1991).

[47] J. KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS 9-22 (1986).

[48] *Id.* Kousser located 82 state and lower federal court cases involving racial discrimination in schools decided between 1834 and 1903 (three-quarters of which were decided after the adoption of the fourteenth amendment). While African-American plaintiffs prevailed in approximately half of the cases, they normally did so on state law grounds or else because of the patently unequal facilities provided for black schools. The only incident of a court striking down a school segregation plan on grounds that it violated the fourteenth amendment was an 1881 decision by Judge Pearson Church of the Crawford County (Pennsylvania) Court of Common Pleas that was reported only in a local newspaper. For a discussion of this case, see Price, *School Segregation in Nineteenth-Century Pennsylvania*, 43 PA. HIST. 121, 133-34 (1976).

[49] Even so, during Brewer's lifetime, the holding of the *Tinnon* majority was reaffirmed in Knox v. Board of Educ. of the City of Independence, 45 Kan. 152 (1891) and Bowles v. Board of Educ. of the City of Wichita, 76 Kan. 361 (1907). Ironically, Brown v. Board of Educ., 349 U.S. 294, 301 (1954) involved a segregated school system in Topeka, Kansas.

[50] See Harlan's majority opinion in Cummings v. Board of Educ., 175 U.S. 528, 545 (1899).

Whatever his motivation, Brewer's dissent in *Tinnon* would be as direct a statement as he would ever make as to the applicability of the fourteenth amendment to the civil rights of African-Americans. Once he reached the United States Supreme Court, his approach would be to avoid this central constitutional issue, even when it was directly presented, and even when it meant rooting his opinions in the narrow technicalities and crabbed legalisms that he normally eschewed. In each subsequent opinion that Brewer wrote involving the question of race, he was able to sidestep the critical question of the constitutional basis of state-mandated racial classifications.

Brewer's Appointment to the United States Supreme Court

After winning reelection to the Kansas Supreme Court in 1876 and 1882, Brewer was appointed to the Federal Circuit Court for the Eighth Circuit in 1884 by President Chester Alan Arthur. Five years later, after gaining national attention with a number of his opinions, he was named by President Benjamin Harrison to replace the recently deceased Justice Stanley Mathews in the United States Supreme Court.[51] In January, 1890, he was sworn in as an associate justice of the Court, a position he was to hold until his death in 1910. His colleagues on the Court included his uncle Stephen Field and, less than a year after his appointment, his Yale classmate Henry Brown.

Brewer's first United States Supreme Court opinion dealing with the rights of African-Americans came in *Louisville, New Orleans and Texas Railway Co. v. Mississippi*,[52] a case that was argued during his first month as a justice. The *Louisville Railway* case represented a challenge to the recently adopted Mississippi statute that required the segregation of passengers by race on any railroad in the state. The appellant railroad, which had been convicted of violating the act shortly after it took effect, contended that the legislation operated as an unconstitutional restraint on interstate commerce.

While the case did present an important commerce clause

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[51] The story of Brewer's appointment is recounted in L. Lardner, *supra* note 4, at 53.

[52] 133 U.S. 587, 588 (1890).

issue, the more fundamental question raised by the Mississippi statute was whether or not such restriction could survive scrutiny under the equal protection clause of the fourteenth amendment. In his opinion, however, Brewer chose not to address the latter issue, observing at the outset that the present case was not "a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or prevented from riding on the train."[53] Consequently, Brewer asserted, the case did not present a "question of personal insult or alleged violation of personal rights."[54] Instead, he maintained, the question was limited "to the power of the State to compel railroad companies to provide, within the State, separate accommodations for the two races."[55] Whether such accommodation was "to be a matter of choice or compulsion" did not "enter into this case."[56] This attempt to define the issues before the Court in such a way that racial implications could be discounted would become characteristic of the way in which Brewer would approach civil rights cases throughout his tenure on the Court. Although the case fundamentally turned on the constitutionality of a state-mandated racial distinction, Brewer struggled to resolve it on the more technical and racially neutral issue of the constitutional limits of state police power.

Even with the issue restricted in this manner, precedent seemed to be on the side of the railroad. In an 1877 decision, *Hall v. Decuir*,[57] the United States Supreme Court had invalidated a statute enacted by Louisiana's reconstruction era government *forbidding* racial discrimination in the seating of passengers on common carriers on the grounds that it infringed upon the federal commerce power. Although *Louisville Railway* appeared to be the mirror image of *Hall*, Brewer was able to distinguish the later case by arguing that the effect of the Louisiana statute in *Hall* was to control commerce beyond the borders of the state (i.e., interstate commerce) while the Mississippi law applied solely to commerce within the state (intrastate com-

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[53] *Louisville Railway*, 133 U.S. at 589.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] 95 U.S. 485 (1878).

merce). Brewer conveniently ignored the fact that no such distinction had been made in the Court's opinion in *Hall*. Brewer also accepted as conclusive the determination by the Mississippi Supreme Court in the previous decision that the statute applied only to intrastate commerce[58] even though a similar determination by the Louisiana Supreme Court had been rejected by Brewer's predecessors thirteen years earlier.[59]

According to Brewer, the requirement of separate cars was analogous to the statutes requiring certain accommodations at depots or compelling trains to stop at crossings of other railroads—restrictions that had been recognized as consistent with the powers of state governments to regulate on behalf of the health and safety of their citizens. Brewer's decision to resolve the case exclusively on commerce clause grounds was accepted by all of his colleagues except Joseph Bradley and John Marshall Harlan who, in a vigorous dissent, denounced the weaknesses of Brewer's distinction between intrastate and interstate commerce and insinuated that the statute might also be unconstitutional on other grounds.[60]

If one concedes that the *Louisville Railroad* case was properly decided as a commerce clause case, then it is difficult to say that Brewer's opinion is inconsistent with his subsequent holdings in other commerce clause cases. The commerce clause opinions of the Fuller Court generally defy any easy categorization, in large part because the Court never worked out an adequate theoretical framework for determining the point at which the exercise of the state police power impinged upon interstate commerce.[61] Brewer's opinions also reflect this tendency toward result-orientation. On the one hand, he was sympathetic to the desires of states to regulate the operation of railroads and other common carriers. He supported, over commerce clause challenges, the right of states to bar the importation of allegedly diseased livestock from other states, even when it took the form of

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[58] Louisville, New Orleans and Texas Ry. v. State, 66 Miss. 662, 675 (1889).

[59] The *Hall* Court rejected the reasoning of the Louisiana Supreme Court in DeCuir v. Benson, 27 La. Ann. 1 (1875).

[60] *Louisville Railway*, 133 U.S. at 592.

[61] *See* D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1896 31-32, 79-80 (1990).

an absolute ban on imports from a particular state.[62] He also believed that the commerce clause permitted states with prohibition laws to bar the importation of alcoholic beverages from other states[63] and allowed them to impose licenses on agents hiring laborers for work outside the state[64] and on elevators and warehouses on the right of way of railroads,[65] as well as to require railroads to provide rail connections for the exchange of cars,[66] and to fine interstate telegraph companies for illegal charges.[67] On the other hand, he believed that both a ban on the sale of cigarettes within a state[68] and a state law requiring interstate trains to stop at specific towns[69] were both undue burdens on interstate commerce and that the commerce clause prohibited a state from requiring out of state corporations to pay a charter fee based on capital stock as a prerequisite for *continuing* to do business within its borders.[70] In the other major commerce clause case decided during the October 1990 term, *Leisy v. Hardin*,[71] Brewer joined the dissenters who argued for greater deference to the state police power.

Brewer's tactic in *Louisville Railroad* of defining away the racial issue was not lost on his contemporaries. For those who hoped to have the Supreme Court directly confront the issue of the constitutionality of the spate of "Jim Crow" accommodation laws adopted around 1890, it was an obstacle that had to be overcome.[72] Homer Plessy's attorney Albion Tourgee realized

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[62] Rasmussen v. Idaho, 181 U.S. 198, 201 (1901); Smith v. St. Louis & S.W. Ry., 181 U.S. 248 (1901). Brewer was the author of the majority opinion in *Rasmussen*.

[63] Leisy v. Hardin, 135 U.S. 100, 125 (1890). Brewer took this position by joining in Justice Horace Gray's dissent.

[64] Williams v. Fears, 179 U.S. 270, 278 (1900).

[65] Wisconsin, Minnesota & Pac. R.R. v. Jacobson, 179 U.S. 287 (1900).

[66] *Id.*

[67] Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 103 (1901).

[68] Brewer took this position in his dissenting opinion in Austin v. Tennessee, 179 U.S. 343, 364 (1900).

[69] Lake Shore and Michigan S. Ry. v. Ohio, 173 U.S. 285, 336 (1899).

[70] Western Union Tel. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 55-56 (1910).

[71] *Leisy*, 135 U.S. at 125.

[72] Between 1887 and 1894, nine southern states—Florida, Mississippi, Texas, Louisiana, Alabama, Arkansas, Tennessee, Georgia, and Kentucky—adopted laws mandating segregation on common carriers. For a discussion of the wave of segregationist legislation in the 1880's and 1890's in the South see C. LOFGREN, *supra* note 1, at 20-27.

this in 1892 while planning the appeal in the case that would reach the Supreme Court as *Plessy v. Ferguson*. In an apparent reference to Brewer's *Louisville Railroad* opinion, Tourgee wrote to his co-counsel that "the first effort of the Supreme Court is always to hunt a hole to crawl out of deciding anything they [sic] can possibly evade."[73]

Justice Brewer's Role in *Plessy v. Ferguson*

There were a number of reasons to believe that if Brewer were forced to confront the issue of whether a separate accommodations act violated the personal rights of African-Americans, he would rule in the affirmative. The very fact that he had gone to such lengths to draw a careful distinction between the commerce clause and the Fourteen Amendment issues in *Louisville Railroad* implied that were the latter before the Court, he at least might have reached a quite different result. Moreover, by the mid-1890's, Brewer had emerged as perhaps the Court's most fervent defender of individual liberty against state encroachment.

As a justice, Brewer travelled the route of laissez-faire constitutionalism blazed by his uncle, Stephen Field.[74] In an era when the Supreme Court became, at least in the opinion of its critics, notorious for its hostility to the regulatory state, Brewer stood apart from his colleagues in the intensity of his belief that the United States Constitution protected private property from public regulation in all but a limited number of situations.[75]

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[73] Letter from Albion Tourgee to James C. Walker (Mar., 1892).

[74] *See* C. Swisher, Stephen Field: Craftsman of the Law (1969 ed.). Field's constitutional views are examined in a number of works. *See also* McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. of Am. Hist. 970 (1975); McCurdy, *Stephen J. Field and the American Judicial Tradition*, in The Fields and the Law 5-18 (1986); G. White, The American Judicial Tradition: Profiles of Leading American Judges 84-108 (2nd ed., 1988). Brewer's subsequent relations with his uncle have also been addressed. *See generally* L. Lardner, *supra* note 4, at 53-54; J. Semonche, *supra* note 9, at 57-58.

[75] In the words of constitutional historian David Currie, both Justice Brewer and Rufus Peckham, his colleague from 1895 to 1909, stood at the "forefront of the Court's assault on social legislation." Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 U. Chi. L. Rev. 867, 901 (1985). Perhaps the boldest

Brewer's views on the issues of economic liberty had been evident long before his appointment to the Supreme Court. On the Kansas Supreme Court and later on the federal Eighth Circuit, he had openly questioned the wide latitude given to state economic regulation by the United States Supreme Court decisions of the 1870's and 1880's. On the Kansas Supreme Court in 1883, he had questioned the propriety of the Kansas prohibition act,[76] and three years later as a federal circuit court judge he declared it unconstitutional,[77] a holding reversed the following year by the United States Supreme Court in *Mugler v. Kansas*.[78] In 1888, in a case involving the reasonableness of rates established by the Iowa Railroad Commission, Brewer rejected arguments that the United States Supreme Court's 1873 landmark holding in *Munn v. Illinois*[79] obligated him to hold that the reasonableness of rates was a legislative, not a judicial, question.[80]

From the time of his arrival in 1890, Brewer joined in most of the United States Supreme Court's highly publicized "pro-property" decisions, beginning with the landmark case of *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*[81] which overturned the Minnesota Railroad and Warehouse Commission Act of 1887 on due process grounds. In subsequent years, he

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statement of his views came in Brewer, *Protection to Private Property from Public Attack*, 55 NEW ENGLANDER 97 (1891) (initially delivered as address at Yale Law School and later published in pamphlet form).

[76] State v. Muglar, 29 Kan. 252 (1883).

[77] State v. Walruff, 26 F. 178, 200 (D. Kan. 1886). In *Muglar*, Brewer had raised the issue of the act's constitutionality, but had not formally dissented. *Muglar*, 29 Kan. at 252.

[78] 123 U.S. 623 (1887).

[79] 94 U.S. 113 (1876). *Munn* and its companion cases upheld the so-called "Granger" laws that placed restrictions on railroads and grain elevator companies in the name of the public interest.

[80] Chicago & N.W. Ry. v. Dey, 35 F. 866, 879 (S.D. Iowa 1888). Brewer's opinion has been viewed by some as in direct contradiction to *Munn*. *See* A. PAUL, *supra* note 4, at 53-54. However, the Iowa act at issue did provide for judicial review of the Commission's rates, and Brewer himself maintained that its decision was consistent with Chief Justice Morrison Waite's assertion that "the State cannot require a railroad corporation to carry persons or property without reward." Stone v. Farmers' Loan and Trust Co., 116 U.S. 307, 331 (1886). Also, the following year, Brewer upheld a revised rate schedule against a similar challenge. Chicago, Burlington & Quincy Ry. v. Dey, 38 F. 656, 664 (1889). For a discussion of these cases, see L. Lardner, *supra* note 4, at 53-54.

[81] 134 U.S. 418 (1890).

joined in decisions that upheld a railroad's right to a fair return on its investment and the Court's power to determine the reasonableness of maximum railroad rates,[82] struck down the federal income tax,[83] narrowed the effect of the Sherman Antitrust Act,[84] sanctioned the power of federal judges to enjoin strikes against railroads,[85] and elevated the principle of liberty of contract to constitutional status.[86]

The true indication of Brewer's commitment to the constitutional protection of individual liberty, however, came not from the cases in which he agreed with the majority, but from those in which he dissented because he felt his colleagues were not willing to go far enough. From the outset, Brewer had made it clear that he believed that the Supreme Court had been lax in its obligation to enforce the rights of private property guaranteed by the fourteenth amendment and the Declaration of Independence (to which Brewer afforded quasi-constitutional status). In an 1891 address at Yale Law School, the recently appointed justice proclaimed:

> [W]e must re-cast some of our judicial decisions; and if that be not possible, we must re-write into our Constitution the affirmations of the Declaration of Independence, in language so clear and preemptory that no judge can doubt or hesitate, and no man, not even a legislator, misunderstand. I emphasize the words clear and preemptory, for many of those who wrought into the Constitution the Fourteenth Amendment believed

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[82] Reagan v. Farmer's Loan and Trust Co., 154 U.S. 362 (1894); Smyth v. Ames, 169 U.S. 466 (1898). Brewer was the author of the majority opinion in *Reagan*.

[83] Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 583 (1895).

[84] United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895).

[85] *In re* Debs, 158 U.S. 564, 594-95 (1895). *Debs* was a Brewer opinion. For a discussion of the significance of the three major constitutional decisions of 1895 (*Pollack*, *Knight*, and *Debs*), see A. PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW 131-220 (1969 ed.).

[86] Adair v. United States, 208 U.S. 161, 173 (1908); Lochner v. New York, 198 U.S. 45, 53 (1905); and Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897). Arnold Paul has maintained that the idea that the due process clause of the fourteenth amendment embodied the principle of liberty of contract was first acknowledged by a majority of the Court in an otherwise obscure opinion written by Brewer in Frisbie v. United States, 157 U.S. 160, 165 (1895). In *Frisbie*, the Court upheld a congressional limitation on lawyer's fees in cases involving United States pensions, but implied that Congress was not free to do as it chose in governing employment relations.

> that they were placing therein a national guarantee against future State invasion of private rights, *but judicial decisions have shorn it of strength and left it nothing but a figure of speech.* [Emphasis in the original.][87]

On two occasions in the early 1890's, Brewer sought to overturn the Court's holding in *Munn v. Illinois* that rates charged by "businesses affected with the public interest" were a proper subject for regulation under the state police power.[88] Although neither effort succeeded, his dissent in the first of the two cases, *Budd v. New York*, contains what is perhaps the most concise statement of Brewer's constitutional vision:

> The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection for him and his property, is both the limitation and the duty of government. If it may regulate the price of one service, which is not a public service . . . why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so, "Looking Backward" is nearer than a dream.[89]

In subsequent cases, Brewer argued in dissent against the constitutionality of laws that established an eight-hour day for miners and employees engaged in public works,[90] outlawed payment of employees with scrip redeemable only in company stores,[91] prescribed the methods to be used in weighing coal in mines where workers were paid on the basis of the amount mined,[92] forbade the sale of artificially colored oleomargarine,[93] and required individuals to submit to compulsory vaccination.[94] In cases involving the power of eminent domain or the use of the police power to limit the rights of property owners, Brewer fre-

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[87] Brewer, *supra* note 75, at 97.

[88] Brass v. North Dakota, 153 U.S. 391, 410 (1894); Budd v. New York, 143 U.S. 517, 551 (1892).

[89] *Budd*, 143 U.S. at 551.

[90] Atkin v. Kansas, 191 U.S. 207, 224 (1903); Holden v. Hardy, 169 U.S. 366, 398 (1898).

[91] Knoxville Iron Co. v. Harbison, 183 U.S. 13, 25 (1901).

[92] McLean v. Arkansas, 211 U.S. 539, 550 (1909).

[93] Plumley v. Massachusetts, 155 U.S. 461, 461 (1894).

[94] Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905).

quently dissented on the grounds that the state ought to be required to compensate the party affected by the regulation, or that the compensation paid was inadequate.[95] Furthermore, he showed a reluctance to accept extensions of the federal police power, dissenting in *Champion v. Ames*[96] and concurring in the decision to overturn an act of Congress in *The First Employers' Liability Cases*.[97] He also consistently maintained that the fourteenth amendment's equal protection clause outlawed all graduated taxes whether they be direct or indirect.[98]

Brewer's general constitutional principles should have made him highly suspicious of state-imposed regulation that limited an individual's liberty solely on the basis of his race. If the state could not constitutionally limit the number of hours a miner or a baker could work (as Brewer maintained in *Holden v. Hardy* and *Lochner*), how could it tell a citizen that he or she must attend a specific school or ride in a specific street car? Similar logic led him to declare unconstitutional a Congressional act that provided for the deportation of Chinese residents who failed to obtain a certificate of residence from the nearest district collector of internal revenue.[99] Three years prior to *Plessy*, in a blistering dissent in *Fong Yue Ting v. United States*,[100] Brewer attacked the act as a violation of numerous rights protected by the first eight amendments (which he insisted applied to aliens as well as to citizens) and as being contrary to the Christian ethic.[101] In his dissent Brewer warned:

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[95] Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 259 (1897); Chicago, Burlington & Quincy Ry. v. Drainage Comm., 200 U.S. 561, 600 (1906).

[96] 188 U.S. 321, 364 (1903) (Fuller, C.J., Brewer, Shiras and Peckham, J.J., dissenting).

[97] 207 U.S. 463, 504 (1908).

[98] *See* Knowlton v. Moore, 178 U.S. 41, 110 (1900); Magoun v. Illinois Trust and Sav. Bank, 170 U.S. 283, 294 (1898). Both cases involved inheritance taxes, the former a state tax and the latter a federal one. *Id.* Brewer was the lone dissenter in both cases. *Id.*

[99] Act of May 5, 1892, ch. 60, 27 Stat. 25. This act was part of an ongoing campaign against the Chinese who were no longer permitted to immigrate to the United States and who were barred from obtaining United States citizenship regardless of how long they had lived in the country. *Id.* On the movement to exclude Chinese immigrants from the United States, see generally, M. KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 156-158, 397, 443-45 (1977).

[100] 149 U.S. 698 (1893).

[101] *Fong Yue Ting*, 149 U.S. at 733. That the United States was a "Christian Na-

> It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people? If the guarantees of these amendments can be thus ignored, in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to?[102]

If nothing else, Brewer's *Fong Yue Ting* dissent demonstrated that his concern for constitutional liberty was not limited solely to the economic realm. Moreover, his 1892 address to the American Home Missionary Society in which he described the United States as a multi-racial nation also seemed to suggest that he would oppose a statute whose sole purpose was to emphasize the alleged inferiority of an entire race.

The difficulties that Brewer experienced in reconciling his views on liberty and race may do more to explain his abstention in *Plessy v. Ferguson* than the mere fact of his absence from oral argument. Brewer was in fact absent from the Court on April 13, 1896. Although he was serving as the chair of the Venezuelan Boundary Commission at the time, his absence from the Court that day was probably more directly attributable to his daughter's untimely death.[103] However, his absence from the

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tion" was an important principle for Brewer, although he never fully explored the meaning or consequences of this designation. *Id.* He was not, however, reluctant to incorporate this assertion in his judicial opinions. *Id.*; *see* Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892); D. BREWER, THE UNITED STATES A CHRISTIAN NATION (1905).

[102] *Fong Yue Ting*, 149 U.S. at 743. Chief Justice Fuller and Justice Field issued separate dissenting opinions. *Id.* at 744, 761 (Field and Fuller, J.J., dissenting).

[103] *See* W. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES, 1888-1910 ,at 250-51 (1967); J. SEMONCHE, *supra* note 9, at 58. Brewer's involvement with the Venezuelan Boundary Commission did take a great deal of his time during the early months of 1896. *Id.* On January 1 of that year, President Grover Cleveland appointed Brewer to chair a congressionally authorized investigating commission whose purpose was to help settle a long-standing boundary dispute between Venezuela and British Guinea. The commission sat in Washington at intervals from January 4, 1896 to May 26, 1897. In its published report, the Commission noted that "[t]his investigation imposed on us a large amount of labor . . . The extent of this work no one not a member of the Commission and not participating in its labors can fully appreciate." REPORT OF THE UNITED STATES COMMISSION TO INVESTIGATE AND REPORT UPON THE DIVISIONAL LINE BETWEEN VENEZUELA AND BRITISH GUINEA 13-14 (1898). For other sources concerning Brewer's involvement with this commission, see G. IRELAND, BOUNDARIES, POSSESSIONS,

Court during the oral argument in *Plessy* did not *necessarily* eliminate his participation in the case. The Court itself at that time had no rule that required a justice to be present at oral argument before he could participate in the resolution of a case.

Between April 13 and April 20, the period in which Brewer was away attending his daughter's funeral, eleven cases were presented to the Court. Of these, five were argued orally before the Court by both parties;[104] two were argued by one party only;[105] four were submitted to the Court with written briefs but with no oral argument.[106] Brewer clearly did not recuse himself from all eleven, since he authored the majority opinion in *Wig-*

AND CONFLICTS IN SOUTH AMERICA 236-38 (1938). Additional material may be found in the special file on the Anglo-Venezuelan Boundary Commission included in the collection of Brewer Family Papers at Yale University Library.

After Great Britain and Venezuela agreed to submit the matter to arbitration in February, 1897, Brewer and Chief Justice Melville Fuller were appointed as the United States' representatives on the five-man arbitral tribunal. This ultimately required Brewer to spend the month of January and much of the summer of 1899 in Paris attending to the business of the arbitration panel. W. KING, *supra*, at 249-60.

Brewer's work with the investigating commission clearly limited his ability to participate in the affairs of the Supreme Court during the spring of 1896. After attending the Court sessions on March 9 and 10, Brewer was absent from the Court every day until it recessed on April 3, missing a total of sixteen daily sessions. The Court reconvened on April 13, the day of the death of Brewer's daughter, but as previously mentioned, Brewer was absent that entire week. He returned to the Court on Tuesday, April 21, and was present for the remainder of that week as well as the following Monday, April 27. He was then absent for the remainder of the week. He returned to the bench on Monday, May 4, but did not appear again until May 25. The Court was in recess between May 9 and 24, with the exception of May 18, when it convened for one day to deliver opinions, including the one in *Plessy v. Ferguson*. Brewer was absent that day as well, and two of his opinions in other cases were read by Chief Justice Fuller. The record of Brewer's attendance at the sessions of the United States Supreme Court for the spring of 1896 is contained in the JOURNAL OF THE SUPREME COURT OF THE UNITED STATES (October Term, 1895). In other words, Brewer's work with the Commission might or might not have required him to be absent on April 13, but the issue was mooted by his daughter's untimely death.

[104] Dibble v. Bellingham Bay Land Co., 163 U.S. 63 (1896) on April 17; Talton v. Mayes, 163 U.S. 376 (1896) on April 16 and 17; Black v. Elkhorn Mining Co., 163 U.S. 445 (1896) on April 15 and 16; Kirk v. United States, 163 U.S. 49 (1896) on April 14; and Plessy v. Ferguson, 163 U.S. 537 (1896) argued on April 13.

[105] Murray v. Louisiana, 163 U.S. 101 (1896) argued and submitted on April 16; and Northern Pac. R.R. v. Egeland, 163 U.S. 93 (1896) on April 20.

[106] Steamer Coquittam v. United States, 163 U.S. 346 (1896) on April 20; Wiggan v. Conolly, 163 U.S. 56 (1896) on April 16; Barwitz v. Beverly, 163 U.S. 118 (1896) submitted on April 13; Wilson v. United States, 162 U.S. 613 (1896) submitted on April 26.

gan v. Conolly,[107] one of the cases that was submitted without oral argument. In the reported opinions for the seven cases in which at least one of the sides presented its argument orally, only in *Plessy* is it specifically mentioned that Brewer took no part in the proceedings.[108]

Although neither Brewer's personal papers nor the records of the Court provide adequate evidence to support such a conclusion, one is tempted to believe that Brewer's unavoidable absence from oral argument gave him the opportunity to avoid participating in a case that made him uncomfortable and, given the opportunity, he took it. Interestingly, in his subsequent civil rights opinions, Brewer quietly distanced himself from the *Plessy* decision, never citing it as authority—even when, as in

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[107] *Wiggan*, 163 U.S. at 59. *Wiggan* involved an appeal from the Supreme Court of Kansas, a fact that may explain why the opinion was assigned to Brewer. *Id.* The decision was handed down on May 4, 1896. *Id.*

[108] *Plessy*, 163 U.S. at 564. Similarly, on May 18, 1896, a day set aside by the Court for the delivery of opinions, the Supreme Court handed down decisions in 34 cases, 27 of which had been argued or submitted to the Court between March 17 and May 1 of that year. Of the 27, 17 had featured an oral argument either by both (14) or at least one (3) of the parties to the case. The remaining 10 were submitted on briefs alone. According to Court records, Brewer was present for the oral argument in only one of the 17 (Indiana v. Kentucky, 163 U.S. 520 (1896)), argued on April 27. However, in only five of the remaining 16 cases is he identified as having taken no part. It is difficult to see a pattern in these cases. Two of the five decisions-*Plessy* and Wong Wing v. United States, 163 U.S. 228, 229 (1896)-involved the rights of racial minorities, but so did Murray v. Louisiana, 190 U.S. 127 (1903), which contains no reference to Brewer's absence. The other three cases seemed to have little if anything in common. Hennington v. Georgia, 163 U.S. 299, 300 (1896) involved the power of a state to prohibit the running of freight trains on Sunday while United States v. Rider, 163 U.S. 132, 135 (1896) and Webster v. Daly, 163 U.S. 155, 156 (1896) involved the Court's jurisdiction over appeals under the Judiciary Act of 1891. In terms of the sequence of the arguments, Brewer is listed as having taken no part in the first, fourth, fifth, sixth and fifteenth of the seventeen cases. Oral arguments in United States v. Winchester and Potomac R.R. Co., 163 U.S. 244 (1896) were begun on March 31 and concluded on April 1, the day the Court heard the argument in *Rider*. Brewer was absent both days, but is listed as having taken no part only in the latter decision.

In two of the 10 cases submitted on briefs alone, Brewer authored the majority opinion. *See* Burfenning v. Chicago, St. Paul, Minneapolis, and Omaha Ry., 163 U.S. 321, 322 (1896); Union Nat'l Bank v. Louisville, New Albany, and Chicago Ry., 163 U.S. 325, 329 (1896). The remaining eight contain no Brewer opinions, and there is no mention of his failure to participate in the deliberations of the Court. Because Brewer was absent on May 18, his opinions in *Burfenning* and *Union National Bank* were read by Chief Justice Fuller. All of the decisions handed down on May 18, 1896, are included in volume 163 of the United States Reports.

Berea College v. Kentucky,[109] it seemed to be directly on point.

Brewer's Subsequent Civil Rights Opinions

Brewer's next opinion in a case involving African-American civil rights did not come until 1903. That year, in *Tarrance v. Florida*,[110] Brewer refused to overturn the convictions of several African-American appellants who had been convicted by an all white jury from which blacks had allegedly been systematically excluded. On December 5, 1900, James Tarrance, Will Smith, Amos Clark, and others had been indicted for murder by a grand jury in Escambia County, Florida. In response, the defendants' attorney had filed a motion to quash the venire and the panels of the grand and petit jurors on the grounds that all African-Americans had been excluded from juries in Escambia County for many years. The following day the prosecutor moved to dismiss the defendants' motion, a request that was granted by the trial judge. The defendants subsequently refiled their motion, supported by an affidavit asserting that while there were more than 1400 adult African-American males in Escambia County, none had ever been called for jury duty. This motion was also denied, and the defendants were subsequently tried, convicted, and sentenced to fifteen years in prison. The conviction was upheld by the Florida Supreme Court.[111]

Although there was little reason to doubt the veracity of the defendants' claim of systematic racial exclusion, Brewer managed to resolve the case without reaching the central issue—the legality of the indictment of the defendants by a grand jury from which African-Americans were systematically excluded. Instead, Brewer defined the case as one that turned on procedural, rather than constitutional, issues. Although Brewer acknowledged that the right to trial by a jury selected without discrimination on the basis of race was protected by the Constitution,[112] he dismissed the appeal on two grounds. In an opinion that quoted liberally

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[109] 211 U.S. 45 (1908).

[110] 188 U.S. 519 (1903).

[111] Tarrance v. State, 43 Fla. 446, 30 So. 685 (1901).

[112] This had been established in Strauder v. West Virginia, 100 U.S. 303, 308-09 (1879).

from the previous opinion of the Florida Supreme Court, he first found that defendants had not properly proved that the discrimination had in fact existed. Brewer admitted that "an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law,"[113] but that such an episode of discrimination could not be proven solely by an affidavit from the indicted parties.[114] Since the appellants had offered no additional evidence other than their own assertion that the discrimination existed, the Supreme Court could not assume that the assertion was correct.[115] The second basis for denying the appeal was the determination of the Florida Supreme Court that under Florida law objections to the selection procedure for a grand jury by an indicted party had to be made through a plea in abatement, rather than through a motion to quash the venire and panel (the motion filed by the defendants in this case). After examining the prior decisions of the Florida Supreme Court cited in the previous opinion, Brewer concluded that this was the settled law in the state of Florida and that, therefore, there was no error for the Supreme Court to correct.[116]

Later that same year, Brewer issued his only dissent in a case dealing with the rights of African-American voters. In *Giles*

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[113] Tarrance v. Florida, 188 U.S. 519, 520 (1903).

[114] *See* Carter v. Texas, 177 U.S. 442, 496 (1900); Smith v. Mississippi, 162 U.S. 592, 600 (1896).

[115] In *Carter*, the Court, in an opinion joined by Brewer, had held that African-American defendants had to be provided the opportunity to introduce evidence of systematic racial exclusion if they sought to do so. In *Tarrance*, the defendants apparently had not done so at the time their motion was denied.

[116] *Tarrance*, 188 U.S. at 524. Consideration of the second ground was necessary because of the county prosecutor's response to the original motion filed by Tarrance and his fellow defendants. *Id.* In response to the December 5, 1900, motion to quash the venire and the panels of the grand and petit jurors, the state's attorney moved to strike the motion on the ground that it "set up no state of facts which, if true, would justify the quashing of the venire." *Id.* Technically, this amounted to an admission of the facts alleged in defendants' motion (which included the assertion of systematic racial exclusion from the jury pool) and thus relieved the defendants of an obligation to introduce further proof of their claim. *Id.* In its opinion, the Florida Supreme Court held that the county attorney's motion to strike was the equivalent of a request to deny the motion to quash on the grounds that it was not the proper method of raising the question sought to be raised. *Id.* As such, it did not amount to an admission of the accuracy of the facts stated in defendants' motion. Brewer accepted this argument as a valid statement of Florida law. *Id.*

v. Harris,[117] an African-American resident of Montgomery, Alabama, had been refused the right to register to vote. In response, he filed a bill of equity in an Alabama federal circuit court asking the court to require the Montgomery, Alabama, election officials to add his name and those of 5,000 other qualified African-American applicants who had been refused enrollment to the registry of permanent voters. The appellant Giles also requested that the recently enacted provisions of the Alabama Constitution pertaining to voter eligibility be declared unconstitutional as contrary to the fourteenth and fifteenth amendments. The circuit court refused to hear the request for want of jurisdiction.

The Supreme Court, in an opinion written by Justice Oliver Wendell Holmes, found that the federal courts had jurisdiction but refused to grant equitable relief. Holmes callously concluded that the appellant could not ask the court to order him registered to vote under a system that the appellant himself claimed to be unconstitutional. Furthermore, Holmes maintained that the equity powers of the federal courts did not give them the power to enforce political rights against the state, and that "relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."[118]

Justices Brown, Harlan, and Brewer all dissented, with the latter two writing opinions. While Harlan stated that he believed that Giles was legally entitled to be enrolled on the permanent voter registry, he concluded that the federal circuit court lacked jurisdiction to hear the case.[119] Brewer, on the other hand, felt that Giles had asserted a right that was protected by the United States Constitution, and that the majority was in error in holding that there was no remedy available from the federal courts.

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[117] 189 U.S. 475 (1903).

[118] *Giles*, 189 U.S. at 488.

[119] The issue that concerned Harlan was the argument in Judiciary Act of Aug. 13, 1988, ch. 373, 24 Stat. 552, that no civil action arising under the Constitution or laws of the United States could be filed in federal court unless the value of the matter in dispute involved more than $2000. In the majority opinion, Holmes ruled that since the jurisdiction of the trial court had not been challenged on these grounds prior to the appeal, no such claim could be raised before the Supreme Court.

He did, however, believe that the only issue properly before the Supreme Court was the jurisdiction of the federal courts and, therefore, that the proper remedy was to remand the case to the lower court for a determination on the merits.

While Brewer's dissent in *Giles v. Jackson* was sympathetic to the problems confronting Southern African-Americans who were struggling to exercise their right of suffrage, he was not persuaded by related claims in *James v. Bowman*,[120] also decided in 1903. Writing for the majority, Brewer upheld the release from federal custody of a white Kentuckian charged with the bribery and intimidation of black voters during the 1898 congressional elections. Brewer's opinion rested on three bases. The first was that the controlling statute, Section 5507 of the Revised Statutes of the United States[121] (originally part of the Civil Rights Act of 1870), was unconstitutional. Section 5507 made it unlawful for an individual to interfere with the attempt of another to exercise the right of suffrage and was based on the enforcement powers granted to Congress by section two of the fifteen amendment. Consistent with a line of cases beginning at the end of the Reconstruction Era,[122] Brewer held that the so-called Reconstruction Amendments did not authorize Congress to outlaw individual, as opposed to state, acts of discrimination.

However, as Brewer himself had pointed out in his dissent in *Giles v. Jackson*, the previous decisions of the Supreme Court had established that the federal courts possessed jurisdiction over matters involved in the election of national officers (including congressmen), independent of the fifteenth amendment. Brewer nevertheless denied that the challenged statute was a proper method of exerting this power.[123] Although the proscribed conduct had occurred during a congressional election,

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[120] 190 U.S. 127 (1903).

[121] U.S. Comp. Stat. 1901, p. 3712.

[122] *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1882); Virginia v. Rives, 100 U.S. 313 (1880); United States v. Cruikshank, 92 U.S. 542 (1876); United States v. Reese, 92 U.S. 214 (1876).

[123] Brewer's *Bowman* opinion fails to mention the Court's 1884 decision in *Ex parte* Yarborough, 110 U.S. 651 (1884) which had upheld the federal government's power to pass laws under Article I, section 4 of the Constitution to guarantee the rights of individuals to vote in federal elections.

the statute, according to Brewer, did not *specifically* limit its application to federal elections. Since it applied indiscriminately to all elections, the entire statute was void. Under Brewer's interpretation, Congress had the power to outlaw the acts with which Bowman had been charged, but it had not yet done so in a constitutional fashion. Finally, as if to defend himself against charges of racial insensitivity, Brewer noted "in passing" that the indictment did not allege that Bowman had bribed the particular voters *because* of their "race, color, or previous condition of servitude," but rather that the victims of the alleged crime were "men of African descent, colored men, negroes, and not white men." In his words, "They were not bribed because they were colored men, but because they were voters. No discrimination on account of race, color or previous condition of servitude is charged."[124] Harlan and Brown dissented without opinion.[125]

Once again, Brewer took a case in which the civil rights of African-Americans were the central issue and argued that it was in fact not about civil rights at all. Although such an approach disregarded the reality of the contemporary situation in the South where widespread hostility toward negro suffrage was tacitly endorsed by state governments,[126] it allowed Brewer to continue to straddle the question of what, if any, protections the Constitution actually provided against discrimination based on race. He followed the same approach in the 1904 case, *Jones v. Montague*,[127] in which he refused to overturn the election of congressmen under the provisions of the 1901 Virginia Constitution that had allegedly provided for the widespread disfranchisement of African-American voters. Writing for a unanimous Court, Brewer dismissed the suit in equity on the grounds that the challenged election had already been held, the canvas of the votes conducted, and the elected representatives had taken their

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[124] *Bowman*, 190 U.S. at 139.

[125] Brewer's opinion striking down part of the 1870 Civil Rights Act produced little public outcry. By 1903, the act was largely viewed as a dead letter. J. SEMONCHE, *supra* note 9, at 58.

[126] *See generally*, J. KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE PARTY SOUTH, 1880-1910 (1974); C. WOODWARD, ORIGINS OF THE NEW SOUTH 321-49 (1971).

[127] 194 U.S. 147 (1904).

seats with the tacit approval of their fellow congressmen. Under such circumstances, Brewer reasoned, the Court was powerless to prohibit the counting of votes, as requested by the petitioners, even if the allegations of racial discrimination in the petition were correct.

At the same time that Brewer masked his unwillingness to extend constitutional protections to African-American appellants under a guise of procedural considerations, he continued to be an outspoken defender of the rights of Chinese-Americans. In his dissenting opinion in *United States v. Sing Tuck*,[128] a case decided the same day as *Jones v. Montague*, Brewer refused to endorse the constitutionality of the administrative procedures used by the Immigration Service to deport Chinese aliens who had allegedly entered the United States illegally. (The procedures failed to provide for a judicial appeal of a determination to deport.) Brewer argued at length that any Chinese person selected for deportation should have access to the federal courts and that the challenged system deprived Chinese-Americans of their constitutionally protected liberties.[129] He closed his *Sing Tuck* dissent with the following prophetic warning:

> Finally, let me say that the time has been when many young men from China came to our educational institutions to pursue their studies, when her commerce sought our shores, and her people came to build our railroads, and when China looked upon this country as her best friend. If all this be reversed and the most populous nation on earth becomes the great antagonist of this republic, the careful student of history will recall the words of Scripture, "they have sown the wind, and they

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[128] 194 U.S. 161 (1904).

[129] *Sing Tuck*, 194 U.S. at 170-82. Brewer's concern for the rights of the Chinese in *Sing Tuck* and other cases might be explained by the nature of the right at issue; in *Sing Tuck* and the earlier case of *Fong Yue Ting v. United States*,the issue was access to the federal court system. This would be in line with what arguably could be considered his pro-civil rights dissent in *Giles v. Harris*. However, the language of his dissent in *Sing Tuck* suggested that his sympathies for the Chinese ran deeper than just a concern for procedural due process. The roots of Brewer's sympathetic attitude toward the Chinese probably lay in his missionary heritage and in his long-standing concern for world peace and the fear that United States immigration policy might severely damage its relationship with China, a nation that Brewer believed would some day play an important role in world affairs.

> shall reap the whirlwind," and for the cause of such antagonism need look no further than the treatment accorded during the last twenty years by this country to the people of that nation.[130]

However eloquent his defense of the Chinese may have been, Brewer's indifference to the corresponding claims of African-Americans continued in his civil rights opinions. In 1905, in *Clyatt v. the United States*,[131] Brewer again delivered an opinion that asserted the rights of African-Americans under the Constitution while simultaneously denying them any legal protection in the immediate case. *Clyatt* involved a white defendant who had been indicted and convicted by a federal jury for violating the Federal Peonage Statute that had been enacted in 1869.[132] The indictment charged that the defendant unlawfully and knowingly returned Will Gordon and Mose Ridley to a condition of peonage, by force and against their will, to work for Samuel M. Clyatt. The record showed that Clyatt had gone from Georgia to Florida to arrest the two African-Americans mentioned in the indictment to take them against their will back to Georgia to work off a debt. The two had been taken into custody under a warrant charging larceny issued by a Georgia magistrate. Such conduct was specifically outlawed by federal law, and violators were subject to fines of between one and five thousand dollars and prison sentences of one to five years.[133]

Writing for the majority, Brewer began by affirming the constitutionality of the peonage laws which had been enacted under the power provided to Congress by the enforcement clause of the thirteenth amendment. To this point, Brewer's decision seemed to signal a rare victory for the African-American position. Clyatt's lawyers had challenged the constitutionality of the Federal Peonage Statute, arguing that just as previous court decisions had held that the fourteenth and fifteenth amendments applied only to state (as opposed to private) action, the Court

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[130] *Sing Tuck*, 194 U.S. at 182.

[131] 197 U.S. 207 (1905).

[132] *Clyatt*, 197 U.S. at 209.

[133] The Federal Peonage Act and this case are discussed in P. DANIEL, THE SHADOW OF SLAVERY 3-17 (1972).

should now hold that the powers granted by the thirteenth amendment were limited by a similar restriction. Since Clyatt was acting as a private individual and not enforcing a state statute, he was, his lawyers argued, not subject to federal law. Brewer rejected this argument completely. Unlike the fourteenth and fifteenth amendment, the thirteenth amendment made no reference to states at all. Instead, it operated as a nationwide ban on slavery and involuntary servitude and gave Congress the authority to enforce its provisions through legislation like the Federal Peonage Act. Brewer then proceeded to define peonage broadly, so that it included any attempt to impose compulsory service to secure the payment of a debt.

Then, in a complete tour de force, Brewer turned to the indictment and found it insufficient because it referred to a "*return . . .* to a condition of peonage." As Brewer viewed the record, there was no evidence that the two victims, Gordon and Ridley, had been in a *previous* state of peonage; consequently, it was not possible for Clyatt to *return* them to a condition of peonage. In focusing on the precise wording of the indictment, Brewer transformed what had begun as a peonage case into a matter of criminal procedure where the Court's attention was focused on the rights of the criminal defendant, Clyatt.

Brewer did this even though the defendant himself had never made this argument. After noting the inconsistency between the language of the indictment and the evidence presented, Brewer launched into a ringing statement of the rights of the accused.

> No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained.[134]

Consequently, the decision of the jury was reversed. However

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[134] *Clyatt*, 197 U.S. at 222.

strained and unexpected the result, Brewer's colleagues had little problem with his decision. Only Harlan dissented.[135]

That Brewer might endorse an expansive reading of the thirteenth amendment was put to rest the following year in *Hodges v. United States*.[136] *Hodges* involved three white men who were convicted in federal court of using physical force to prevent a group of black laborers from carrying out a labor contract with the owners of a sawmill. Brewer, again writing for the majority, reversed the convictions on the grounds that the fourteenth amendment gave the federal government no jurisdiction over the action of private individuals and that the thirteenth amendment could not be read so expansively as to prohibit this conduct. The federal government maintained that the defendants' actions had been motivated solely by the race of the victims and that, as such, it imposed a badge of servitude prohibited by the thirteenth amendment. In denying that the race of the victims provided grounds for invoking federal jurisdiction, Brewer insisted that he was affirming the rights of African-Americans as full American citizens. The thirteenth amendment had, he insisted, outlawed all forms of slavery and involuntary servitude. It had not, however, made African-Americans the special wards of the United States government; nor had it made the federal government, rather than the states, the guarantors of individual liberty. To allow a criminal prosecution here would be to authorize the federal government to supplant the states as the protectors of all the individual rights of both races and that, for Brewer (and most of his contemporaries) was clearly beyond the intentions of the amendment's framers. In one opinion, Brewer commented on the federal government's treatment of former slaves:

> [Freed slaves have been dealt with in a manner] which declined to constitute them wards of the nation or leave in a condition of alienage where they would be subject to the jurisdic-

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[135] *Id.* at 223. While the *Clyatt* decision represented a defeat for the Roosevelt Administration's efforts to enforce the Federal Peonage Act, it did at least establish the constitutionality of the act and thereby pave the way for future, more carefully crafted, indictments. P. DANIEL, *supra* note 133, at 17.

[136] 203 U.S. 1 (1906).

> tion of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interest would be served, they taking their chances with other citizens in the States where they should make their homes.[137]

The belief that African-Americans should be left on their own to struggle for their rights in the state rather than federal courts was at the heart of Brewer's most famous decision dealing with issues of race, the 1908 majority opinion in *Berea College v. Kentucky*.[138] At issue in *Berea College* was a Kentucky statute that prohibited private schools from educating black and white students at the same time and place. In spite of the fact that the plaintiff raised several serious constitutional challenges to the statute, including a citation to *Lochner v. New York*[139] (a decision in which Brewer had concurred three years earlier), Brewer chose to resolve the case within the framework of a state's power to regulate its corporations.

At the time it was decided, *Berea College* involved one of the few remaining questions pertaining to the constitutionality of the increasingly intricate system of "Jim Crow" restrictions appearing in the American South. Berea College was a small, independent institution of higher learning that had been founded "in order to promote the cause of Christ,"[140] and was committed to interracial education. Unlike cases involving public schools or common carriers, Berea College was neither a public institution nor a private enterprise historically subject to public regulation. Instead, it was a private institution whose students were free to go elsewhere if they objected to the integrationist policies of the college. In 1904, its policies ran afoul of a recently enacted Kentucky statute that prohibited the teaching of black and white students in the same institution.[141] Berea College was convicted of violating the statute, and its conviction was upheld by the Kentucky Court of Appeals.[142]

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[137] *Hodges*, 203 U.S. at 19-20.

[138] 211 U.S. 45 (1908).

[139] 198 U.S. 45 (1905).

[140] *Berea College*, 211 U.S. at 60.

[141] Ky. Acts 1904, chap. 85, p. 181.

[142] Berea College v. State, 123 Ky. 209, 94 S.W. 623 (1906).

Berea College was a corporation chartered by the state of Kentucky,[143] and the first question to be answered was whether or not the Court could rule solely on the question of the constitutionality of the Kentucky Act as applied to corporations or whether it had to rule on its general constitutionality. The decision of the lower court pointed toward the latter, since section one of the statute in question made it unlawful for "any person, corporation, or association" to teach black and white students together and since the Kentucky Court of Appeals had sustained the validity of the statute as applied to "all individuals, corporations, and associations."[144]

Brewer, predictably, took the more narrow approach, maintaining that "it is unnecessary for us to consider anything more than the question of its validity as applied to corporations."[145] In *James v. Bowman*,[146] Brewer had refused to consider the severability of the provisions of a federal civil rights act, but here he was willing to treat the Kentucky act as though it contained separate provisions relating to individuals, corporations, and associations. Brewer wrote:

> The statute is clearly separable and may be valid as to one class while invalid as to another. Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations. There is no force in the suggestion that the statute, although clearly separable, must stand or fall as an entirety on the ground the legislature would not have enacted one part unless it could reach all.[147]

Since Berea College was a corporation chartered by the state of Kentucky, its charter was subject to revocation, alteration, or amendment by the state, so long as the object of the charter was not substantially impaired. The language of the challenged statute, according to Brewer, operated as a legitimate

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[143] The original charter was approved on March 9, 1854. On June 10, 1899, it was reincorporated.

[144] *Berea College*, 211 U.S. at 46.

[145] *Id.* at 54.

[146] *Bowman*, 190 U.S. at 127.

[147] *Berea College*, 211 U.S. at 54-55.

amendment to the school's charter, even though the act itself made no reference to corporate charters. Brewer made the last assertion without any citation to precedent, stating only that to decide otherwise would be "resting too much on mere form."[148] Having redefined the issue, Brewer was able to decide the case in such a way that was consistent with his general constitutional principles but which did not require him affirmatively to approve of the power of the state to discriminate against individuals solely on the basis of their race. Throughout his career Brewer had drawn a sharp constitutional distinction between private individuals and corporations. Because the latter were creations of the state, they were therefore subject to a degree of public regulation that Brewer found unacceptable when applied to private individuals.[149] In fact, Brewer went to great lengths to distinguish the property rights of individuals from those of corporations because his constitutional and economic philosophy was based on the individual economic actor, not the modern business corporation.[150]

On the Court, Brewer proved to be less sympathetic to the claims of corporations (and railroads in particular) than many of

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[148] *Id.* at 57.

[149] That Brewer drew such a distinction has not always been appreciated. The view popularized by progressive historians that Justices like Brewer were merely agents for corporate interests has been generally abandoned in favor of a more sophisticated interpretation that places them within the nineteenth century liberal tradition. There are several progressive interpretations of Brewer. *See* H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 138 (1974); A. PAUL, *supra* note 4, at 54. There are also more moderate evaluations. *See* Bergan, *supra* note 4, at 53; Gamer, *supra* note 4, at 53; J. SEMONCHE, *supra* note 9, at 24, 54; *see also* O. FISS, *supra* note 4, at 69.

[150] For a concise statement of this position by Brewer, see his concurrence in Northern Sec. Co. v. United States, 193 U.S. 197, 360 (1905) (Brewer, J., concurring). It was his adherence to this distinction that had led both the opponents and supporters of business interests to applaud his nomination to the Court in 1889. One anti-corporation newspaper proclaimed that his record showed that he was "hostile to corporations and monopolies." New York World (undated clipping included in Brewer's scrapbook in collection of Brewer Family Papers). Another praised him for a recent decision "against railroads which shippers consider not only sound law but favorable to their interests." Burlington (Iowa) Hawkeye (undated clipping included in Brewer's scrapbook in collection of Brewer Family Papers). On the other hand, one pro-business paper saw him as a nominee likely to protect the interests of railroads from state railroad commissions. Wall Street Daily News (undated clipping included in Brewer's scrapbook in collection of Brewer Family Papers).

his colleagues. In numerous public addresses while on the bench, Brewer openly criticized the excesses of American corporations. According to Brewer, corporate action was "often selfish, remorseless, and cruel";[151] efforts of corporations to "crush out opposition" were to be denounced as violations of "the first principles of the Declaration of Independence";[152] and combinations of capital were to be derided for destroying their financially insecure competitors.[153]

Brewer also believed that states should be permitted great latitude in controlling their corporations, so long as they guaranteed them a fair return on their investment. In *Smiley v. Kansas*,[154] Brewer rejected a challenge to a Kansas antitrust law that prohibited price-fixing arrangements. Although the appellant grain dealers argued that the Kansas statute was an unconstitutional limitation on the liberty to contract, Brewer found no merit to this argument under the circumstances. He also wrote a number of dissents in cases in which he believed the Court had improperly interfered with the power of the states to force railroads to fulfill their duty to the public.[155] In *Atchison, Topeka, and Santa Fe Railroad v. Matthews*, he authored the majority opinion which upheld a Kansas law that required railroads to pay the attorney fees of successful plaintiffs whose property had been damaged by fires caused by trains.[156] Although he had joined the majority in limiting the application of the Sherman Antitrust Act in the *E. C. Knight* decision, he was also generally sympathetic to the Justice Department's prosecutions of large corporations under the Act.[157] He sided with the progressive ma-

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[151] *See* Brewer, *supra* note 34, at 69.

[152] Address to the Association of Agents of the Northwestern Mutual Life Insurance Company (1908), *quoted in* L. Lardner, *supra* note 4, at 53.

[153] Brewer's dislike of the predatory practices of large corporations is elaborated in several works. *See* Brewer, *Organized Wealth and the Judiciary*, 57 THE INDEPENDENT 301 (1904); L. Lardner, *supra* note 4, at 53.

[154] 196 U.S. 447 (1905).

[155] Northern Pac. R.R. v. Washington Territory *ex. rel*, Dustin, 142 U.S. 492 (1892); Missouri Pac. Ry. v. United States, 189 U.S. 274 (1903).

[156] 174 U.S. 96 (1899).

[157] It has been argued that *United States v. E.C. Knight* itself was not simply an attempt to insulate American corporations from national regulation, but an effort by the Supreme Court to compel the states to enforce their corporate laws. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporate Law,*

jority in *Addystone Pipe and Steel Co. v. United States*[158] (a decision that substantially undercut the impact of *E. C. Knight*[159]), and he provided the critical fifth vote in *Northern Securities Co. v. United States*,[160] which upheld the application of the Antitrust Act to a powerful railroad holding company.[161] In Brewer's view, large combinations of capital and meddlesome legislatures were equally objectionable, because both threatened the economic freedom of the individual, the hallmark of his constitutional philosophy.

Although Berea College was hardly a major corporation, to emphasize its corporate form was to emphasize the power of the state to regulate and to downplay any protections the fourteenth amendment might provide. Certainly, Brewer was correct that states had the power to reserve the right to amend corporate charters. (The recognition of this power dated back to Justice Story's concurrence in the case of *Trustees of Dartmouth College*[162] and the Constitution of the State of Kentucky specifically reserved this right for the legislature).[163] However, Brewer's opinion, while acknowledging that the act *might* be unconstitutional as applied to individuals, ignored the possibility that the fourteenth amendment placed limitations on this particular power, especially when the state sought to impose racially motivated modifications. As had been the case many times before,

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1869-1903, 53 BUS. HIST. REV. 304 (1979).

[158] 175 U.S. 211 (1899). The significance of *Addystone* is discussed in several works. *See* M. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916, at 130-33 (1988); M. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 532 (1988).

[159] In his concurrence in the *Northern Sec. Co.* case, Brewer drew a distinction between the rights of state-created corporations and the rights of individuals, suggesting that not all constitutional protections available to the latter applied to the former. Northern Sec. Co. v. United States, 193 U.S. 197 (1904) (Brewer, J., dissenting); *see also* O. FISS, *supra* note 4, at 54.

[160] 193 U.S. 197 (1904).

[161] Brewer also voted to uphold Sherman Act prosecutions in Montague & Co. v. Lowry, 193 U.S. 38 (1904), Swift & Co. v. United States, 196 U.S. 375 (1905), and Loewe v. Lawlor, 208 U.S. 274 (1908).

[162] Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[163] Section 3 of the Bill of Rights of the 1850 Kentucky Constitution (in force at the time of this case and still in force today) provides that "every grant of a franchise, privilege, or exemption shall remain, subject to revocation, alteration, or amendment." KY. CONST. § 3 (1850).

Harlan was not persuaded by Brewer's distinctions. In his dissent, joined by Justice William Day, Harlan rejected Brewer's assertion that the statute was severable and went on to argue that the actions of his home state's legislature were "an arbitrary invasion of the rights of liberty and property guaranteed by the fourteenth amendment against hostile state action, and is, therefore, void."[164]

Brewer's opinion in *Berea College* followed the same pattern as all his majority opinions in cases involving the civil rights of African-Americans. He affirmed the general rights claims by appellants and even acknowledged that legal remedies might be available in different circumstances, but in the case at hand, he determined that other considerations governed. In his opinion, he scrupulously avoided any reference to *Plessy v. Ferguson*, and he left open the possibility that the fourteenth amendment might protect private individuals who sought integrated schooling. In reality, Brewer's opinion had the practical effect of legitimizing such statutes until well after World War II.

Justice Brewer: An Evaluation

Berea College was the last case dealing with the civil rights of African-Americans decided by the United States Supreme Court before Brewer's death in March 1910. From the perspective of modern notions of constitutionally guaranteed civil rights, his record was hardly an impressive one. Of course, the fact that a Northern judge in the late nineteenth century, even one who had held strong abolitionist views in his youth, would adopt an attitude of indifference toward the civil rights of African-Americans was not in itself remarkable. Large numbers of formerly anti-slavery Northerners "gave up" on the cause of African-American civil rights in the aftermath of Reconstruction and acquiesced in the restoration of white supremacy in the South. Beginning in the late 1870's, Northern liberals began a

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[164] Berea College v. Kentucky, 211 U.S. 45, 67-68 (1908). As authority, Harlan cited the substantive due process cases, Allgeyer v. Louisiana, 165 U.S. 578 (1897) and Adair v. United States, 208 U.S. 161 (1908), decisions in which Brewer had enthusiastically joined.

steady retreat on the race issue.[165] As white Southerners abandoned earlier pledges to protect the constitutional rights of African-Americans, Northern opinion began to emphasize conciliation with the South rather than the defense of civil rights. In the words of historian C. Vann Woodward:

> It was quite common in the 'eighties and 'nineties to find in the *Nation*, *Harper's Weekly*, the *North American Review*, or the *Atlantic Monthly* Northern liberals and former abolitionists mouthing the shibboleths of white supremacy regarding the Negro's innate inferiority, shiftlessness, and hopeless unfitness for full participation in the white man's civilization. Such expressions doubtless did much to add to the reconciliation of North and South, but they did so at the expense of the Negro.[166]

Although this acquiescence was initially coupled with an understanding that African-Americans would not be deprived of their formal legal rights, by the end of the nineteenth century it had come to include an acceptance of legalized segregation and disfranchisement.[167]

While Brewer declined to use his position of authority as a Justice of the United States Supreme Court on behalf of the civil rights of African-Americans, his overall views on race did not harden to the degree described by Woodward. In fact, if one looks only at the pronouncements Brewer made off the bench between 1890 and 1910, he comes across as a crusader for equal treatment of the black race at a time when educated Americans, in the North as well as the South, were becoming increasingly persuaded by scientific theories of racial inferiority.[168] Certainly,

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[165] C. Woodward, The Strange Career of Jim Crow 69-74 (2d ed. 1966).

[166] *Id.* at 70.

[167] For other discussions of Northern racial attitudes in the late nineteenth century, see G. Frederickson, The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914, at 283-325 (1971); C. Lofgren, *supra* note 1, at 51; W. Nelson, The Roots of American Bureaucracy, 1830-1900, at 62-81, 133-40 (1982); L. Simpson, Mind and the American Civil War: A Meditation on Lost Causes (1989) (for racial views of greater New England culture specifically); *see also* Nelson, *The Impact of the Antislavery Movement Upon Styles of Reasoning in Nineteenth Century America*, 87 Harv. L. Rev. 513 (1974).

[168] *See generally* J. Haller, Outcasts from Evolution: Scientific Attitudes of Racial Inferiority, 1859-1900 (1971) (noting that Brewer never became as callous to

Brewer never believed that he had abandoned the cause of his youth. In a fourth of July oration in 1893, he spoke glowingly of the importance of the anti-slavery movement, of John Brown, and of the thirteenth amendment for their role in helping "personal liberty" become "the universal affirmation of the law."[169] The progress of the black race was a topic he returned to with regularity, and he welcomed the opportunity to address African-American audiences.[170] At the time of his death, he was eulogized for his sympathy "with the oppressed of all races and classes."[171]

How then, does one explain the apparent inconsistency between Brewer's professed support for the rights of African-Americans and the lengths to which he went while on the Court to avoid endorsing that position? At least part of the answer can be found in an address on the cause of black education Brewer delivered to the American Missionary Association shortly after the turn of the century. In this address, Brewer took aim at those who used the claim of alleged black inferiority to justify a reduction in support for black education. Lavishing praise on Hampton Institute (which he had recently visited) and Booker T. Washington's Tuskegee Institute and its offspring, Brewer

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plight of African-Americans as his uncles Stephen and Henry Field); C. LOFGREN, *supra* note 1, at 51 (discussion of racial attitudes of Henry Field); C. MCCURDY, *Stephen J. Field and the American Judicial Tradition*, in THE FIELDS AND THE LAW 17 (1986) (discussion of racial attitudes of Stephen Field).

[169] Address by Justice Brewer at Woodstock, Connecticut (July 4, 1893) (included in collection of Brewer Family Papers).

[170] Writings by Brewer that reflect a sympathetic attitude toward race include Brewer, *Address of Mr. Justice Brewer*, in MINUTES OF THE SIXTY-SIXTH ANNUAL MEETING OF THE AMERICAN HOME MISSIONARY SOCIETY 95 (1892); Brewer, *Plain Words on the Crime of Lynching*, 97 LESLIE'S WEEKLY 182 (1903); Brewer, *Address at 30th Anniversary of Hampton Institute*, 35 THE SOUTHERN WORKMAN 359 (1906); Letter to editors of the Paladium (n.d.) (unidentified letter included in collection of Brewer Family Papers); Address Delivered at the Fiftieth Annual Meeting of the American Missionary Association (Nov. 21, 1896) [hereinafter Jubilee Address] (future equality of the races forseen); Address at the Commencement Exercises of the University of Wisconsin Law School (deploring disfranchisement of African-American voters); Address on the Black Race Delivered to Black Students at an Unidentified College or University (n.d.) (unidentified address included in collection of Brewer Family Papers); Address on the Education of Black People Delivered to an Unidentified Association (n.d.) (unidentified address included in collection of Brewer Family Papers).

[171] H. KARRICK, *supra* note 8, at 57.

compared African-Americans to the Hebrew slaves of the Old Testament who had been delivered out of bondage in Egypt by Moses. It had been necessary for the ancient Hebrews to wander for forty years in the wilderness before reaching the promised land, and, in Brewer's view, only time was required for African-Americans to achieve their proper role in society. In pleading the case for continued white support of black education, Brewer proclaimed: "They are here as citizens. Whatever temporary restrictions may be placed upon their approach to the ballot box, the time will come when all barriers will be broken down and they will enjoy everywhere the full rights of citizenship."[172] In the short run, however, there were problems that the "race" had to overcome—ignorance, susceptibility to demagoguery, the inability to "distinguish between liberty and license," and the failure to understand "the obligations of morality and purity."[173] Similarly, in an address to African-American college students (probably at Hampton Institute), Brewer rejected the idea that the black race would always be at the bottom of society, comparing the status of African-Americans in 1900 with that of Anglo-Saxons in the Roman world of 2000 years before. He emphasized the absolute necessity of self-help and suggested that the "failure" of Reconstruction was related to the fact that "no race is ever lifted up into a higher life simply through outside forces." He also made it clear that he viewed the responsibility for black advancement to lie with the educated men in his audience.[174]

Such statements reveal that although Brewer repudiated the idea that the proper role of government could ever be one of paternalism, his attitude toward African-Americans was colored by the very same paternalistic impulse that had led him to accept the legitimacy of separate schools in *Tinnon*. The status of African-Americans was essentially that of minor children. Ultimately their entitlement to the full rights of citizenship was not a matter for dispute. However, until they were ready to assume the citizenship's mantle, they, like minor children, might have to

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[172] Jubilee Address, *supra* note 170, at 139-40.

[173] *Id.* Although undated, the address makes reference to the recently published 1900 United States Census.

[174] Address to Black Students of Unidentified College or University by Justice Brewer (n.d.) (unidentified address included in collection of Brewer Family Papers).

accept some limitations on the full exercise of their rights.

On the other hand, Brewer's aversion to *governmental* paternalism dictated that the responsibility of attaining the right to full citizenship lay with blacks themselves and their white supporters and not with the state. As a practical matter, this meant that African-Americans would have to accept the indignities of the emerging "Jim Crow" system. However, according to Brewer, they could take consolation in the fact that their current status was only temporary because their progress as a race was inevitable. The day would come when racial distinctions would be unnecessary. Consequently, while it would be improper for the Supreme Court to afford any special status to their claims, it would also be inappropriate for the Court to imply that African-Americans were locked into a permanently inferior position in American society. It was a situation in which the most desirable approach was to evade the issue whenever possible. When the creed of individual liberty clashed with the social reality of race, Brewer chose to take refuge in the very sort of technical niceties that he normally eschewed.

While Brewer should not be exonerated for his failure to acknowledge the meritorious claims of African-Americans to constitutional protections, his experience does illuminate how narrow the options were for the men who sat on the Court in the era of "Jim Crow." If Brewer found it impossible to embrace the cause of African-American civil rights in his opinions, then it should not be surprising that his colleagues, who lacked his abolitionist heritage and interest in the race issue, found little problem with the constitutional standard of separate but equal. In this light, the racial egalitarianism of John Marshall Harlan is even more remarkable.

Ironically, Brewer's most important legacy in the realm of civil rights was the ambivalent character of his opinions and the scrupulous way in which he avoided addressing the question of race directly. At a time when "scientific" theories of negro inferiority had their greatest popular acceptance, and the reasonableness of racial separation seemed least controversial, it was possible that the Court could have elected to read contemporary white racial views directly into the Constitution in much the same manner that it did with the then fashionable economic

doctrines of liberty of contract and substantive due process. There were more than hints of this in the *Plessy* opinion—a decison that Brewer never cited in any of his opinions involving civil rights.[175] For Brewer, however, the proper response was not an endorsement of white racial superiority or of the natural incompatibility of the races, nor a reiteration of the *Plessy* holding that reasonable racial distinctions could withstand constitutional challenge. Rather, Brewer adopted the position that the Court need not directly address the issue of what rights the Constitution guaranteed to African-Americans.

In his *Berea College* dissent, Justice Harlan demanded to know:

> Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?[176]

Unfortunately, the contemporary answer to Harlan's question was "yes." Although the question clearly troubled Brewer, he could not, like Harlan, bring himself to answer in the negative. In his mind, African-Americans would simply have to wait until the time was right for them to participate fully as American citizens. However, contrary to many of his white contemporaries, he did at least believe that such a time would come.

In the meantime, the best that Brewer could do was to avoid writing the legitimacy of racial distinctions directly into the body of American constitutional law. By pretending repeatedly that the issue before the Court was not one of race, however disingenuous the assertion may have been, Brewer at least avoided having to answer Harlan's question in the affirmative, and when the Court's attitudes toward the rights of African-

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[175] *See* C. LOFGREN, *supra* note 1, at 51; Miller, *Constitutional Law and the Rhetoric of Race*, in LAW IN AMERICAN HISTORY 147, 170-71 (B. Bailyn & D. Fleming eds. 1971).

[176] *Berea College*, 211 U.S. at 69 (Harlan, J., dissenting).

Americans did finally change, Brewer's opinions posed no real obstacle to the implementation of a more racially egalitarian constitutional vision.

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COMMENTS

RECENT AMENDMENTS TO THE MISSISSIPPI RULES OF EVIDENCE—THE RIGHTS OF THE VICTIM VS. THE RIGHTS OF THE ACCUSED IN CHILD ABUSE PROSECUTIONS AND DEPENDENCY OR NEGLECT PROCEEDINGS

I. Introduction

The modern courtroom is a last resort and in many cases the last hope for the victims of child abuse. An examination of the authorities discussed herein will demonstrate that this victim is most often the innocent child. On the other hand, in some cases it is the accused that is victimized.

The accused is afforded a plethora of constitutionally guaranteed rights if he becomes the subject of a criminal indictment.[1] However, the case law that follows demonstrates that, absent such an indictment

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[1] U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.* The confrontation clause of the sixth amendment is applicable to the states through the fourteenth amendment to the United States Constitution. Pointer v. Texas, 380 U.S. 400, 403 (1965). The sixth amendment entitles the defendant in a criminal prosecution to compulsory process to secure witnesses in support of his defense. Washington v. Texas, 388 U.S. 14, 23 (1967); *see also* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (defendant also has right physically to confront and cross-examine any witness who testifies against him); Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (same); Chambers v. Mississippi, 410 U.S. 284, 294-95 (1973) (same). This enables the jury to evaluate the credibility of a witness by observing his behavior on the stand. Mattox v. United States, 156 U.S. 237, 242-43 (1895). Additionally, a criminal defendant is guaranteed legal representation throughout the prosecution of his case. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

and during the period preceding the indictment, the state is given broad authority to investigate allegations of child abuse or neglect and to take the actions it deems necessary for the safety of the child. This broad authority bestowed upon various agencies of the state is necessary for the protection of our children,[2] but there are occasions in which these actions result in unjust treatment of the accused with little or no opportunity for recourse.[3]

The rights of the child victim are a more recent topic of judicial scrutiny. Recent Supreme Court decisions determined that even a state's reckless failure to protect children from abuse does not violate the constitutional rights of the children unless the state has taken the child into its custody.[4]

Another recent judicial concern has been the rights of the child victim as a witness[5] and the conflict of those rights with the rights of the accused under the confrontation clause of the sixth amendment.[6] This concern is applicable to the child witness in civil litigation as well as in a criminal prosecution.[7] Many states, including Mississippi, have

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[2] *See* New Jersey Dev. of Youth & Family Serv. v. A.W., 103 N.J. 591, 616, 512 A.2d 438, 451 n.14 (1986) (to wait until child is injured makes no sense); *In re* Custody of Minor, 377 Mass. 876, 882-83, 389 N.E.2d 68, 73 (1979) (court may decide necessity of "care and protection before child is mistreated").

[3] Imbler v. Pachtman, 424 U.S. 409, 428 (1976). *Imbler*, which stands for the proposition that a prosecutor is absolutely immune, justifies this position by stating that absolute prosecutorial immunity serves a broader public interest than allowing a wronged defendant avenues for civil redress. *Id.*

[4] DeShaney v. Winnebago City Social Serv. Dep't, 499 U.S. 189, 199 (1989). "The affirmative duty to protect arises not from the State's knowledge of the individual predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200.

[5] Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 644 (1982). The plight of the child victim has concerned legal scholars for more than two decades. *See* Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 978 (1969) (cries for help in child abuse proceedings largely unrecognized). Although Libai's article suggested special provisions for taking the testimony of child victims, the ideas "fell on deaf ears" for many years. Parker, *supra*, at 645.

[6] U.S. CONST. amend. VI. Although the Supreme Court recognized the right of a criminal defendant to confront and cross-examine his accusers, the Court stated that this general rule was subject to public policy exceptions. *Mattox*, 156 U.S. at 243.

[7] Parker, *supra* note 5, at 656. Many instances of child abuse are never prosecuted but are civil in nature, simply addressing the issue of whether the child should be removed from the home. Katy, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1, 4 (1975). Additionally, children are sometimes called upon as witnesses in divorce or custody hearings. Parker, *supra* note 5, at 661-64.

attempted to address this issue through legislation.[8]

Alleged child abuse presents a special problem for the poor. Statistically, many victims of child abuse are children of indigents.[9] Are they entitled to counsel?

This comment will address these issues and attempt to evaluate whether the constitutionally guaranteed rights of either the accused or the victim have been protected successfully.

II. The Rights of the Accused

A. *Prosecutorial Immunity for Pursuing False Claims and for Failure to Investigate*

Although the majority of allegations of child abuse or neglect are made with a factual basis that would lead a reasonable person to believe that the actual abuse had occurred, there are instances in which not only are the allegations false, but there is no rational basis for the charges. This occurs either through improper investigation, mistake, or in some cases through intentional conspiracy to deprive an accused of his right to rear his children. Regardless of how this occurs, there is little, if any, recourse that the accused has against those guilty of this conduct.

In *Grant v. Hollenback*,[10] a former child abuse defendant brought a civil rights action claiming that county prosecutors had knowingly conspired with his former wife and knowingly brought false charges of child abuse against him.[11] The court found the prosecutors to be absolutely immune from the claim that they conspired knowingly to bring false charges and for failure to investigate the facts both before and after the indictment.[12] In addition, the court found one prosecutor to

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[8] *See, e.g.*, Ala. Code § 15-25-2(a) (Supp. 1991) (allowing child abuse victim to testify via closed-circuit television); Ariz. Rev. Stat. Ann. § 13-4253(a) (1989) (same); Ga. Code Ann. § 17-8-55 (1990) (same); Kan. Stat. Ann. § 38-1558 (1986) (same); La. Rev. Stat. Ann. § 15:283 (West Supp. 1991) (same); Miss. Code Ann. § 13-1-405 (Supp. 1991) (same).

[9] American Humane Ass'n, *Trends in Child Abuse and Neglect: A National Perspective* 24, Table IV-3 (1984).

[10] 870 F.2d 1135 (6th Cir. 1989).

[11] *Grant*, 870 F.2d at 1135. Grant was involved in a bitter custody dispute with his former wife at the time of the charges. *Id.* at 1136.

[12] *Id.* at 1140. However, other circuits have found intentional assertion of government power amounting to gross negligence, recklessness, or deliberate indifference may be sufficient to state a section 1983 claim. Wood v. Ostrander, 851 F.2d 1212, 1214-15 (9th Cir. 1988); *see* Dell Fargo v. City of San Bautista, 857 F.2d 638, 641 n.5 (9th Cir. 1988) (majority of courts of appeals decisions are consistent with *Wood*); *see also* Wood-

be absolutely immune for alleged perjury before the grand jury.[13] The court reasoned that the conduct had occurred while the prosecutors were functioning in a quasi-judicial or advocatory role and, therefore, they were entitled to absolute immunity even if the allegations were true.[14] The court noted the unjustness in its decision, finding that "this immunity does leave the generally wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest."[15]

However, all persons involved in child abuse investigations and prosecutions do not enjoy such a broad grant of immunity. In *Achterhof v. Selvaggio*,[16] parents filed a civil rights action claiming that a social worker interfered with their family relationship in violation of their rights to due process, equal protection, and freedom of association, by opening an investigation of alleged child abuse.[17] The father's name was placed on a central registry of child abuse reports and the social worker failed to expunge his name after an investigation did not uncover a basis for the allegations.[18] The court distinguished between prosecutorial functions that had been extended to government officials whose duties were analogous to prosecutors, and functions of those officials that were administrative or investigatory in nature.[19] The court concluded that a social worker's decisions to open a case file

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rum v. Woodward County, Okla., 866 F.2d 1121, 1126 (9th Cir. 1989) (to prove conspiracy under section 1983 petitioner must show meeting of minds of social service employees to violate his constitutional rights).

[13] *Grant*, 870 F.2d at 1136. This prosecutor testified that the state possessed evidence, including an audio tape, showing that Grant had sexually abused his son. *Id.* Grant alleged that this was "known or should have been known to be false." *Id.*

[14] *Id.* at 1139. The court admonished the prosecutors for their conduct and, therefore, must have believed there to be some basis for the complaint. *Id.*

[15] *Id.* (quoting Imbler v. Pachtman, 424 U.S. 409, 420 (1976)).

[16] 886 F.2d 826 (6th Cir. 1989).

[17] *Achterhof*, 886 F.2d at 827. The investigation stemmed from an injury incurred by the daughter when the father slapped her. *Id.*

[18] *Id.* at 828. The father's name was placed on the list pursuant to state statutes but should have been expunged when no evidence of abuse could be found. *Id.* at 831.

[19] *Id.* at 829. The court recognized that the Supreme Court had not expressly adopted this distinction but had relied upon it in dicta. *Id.*; *see also* Coverdell v. Department of Social & Health Serv., 834 F.2d 758, 762 (9th Cir. 1987) (social workers entitled to absolute quasi-prosecutorial immunity for "seeking and obtaining court order in child dependency proceedings"); Meyers v. Contra Costa County Dep't of Social Serv., 812 F.2d 1154, 1157 (9th Cir. 1987) (social workers entitled to absolute quasi-prosecutorial immunity for initiation and pursuit of functions connected with child dependency proceedings).

and to place and maintain the father's name on a central registry were purely administrative functions.[20] As a result, the court held that the social worker was not entitled to absolute immunity for these decisions.[21]

The conclusion that may be drawn is that judges and prosecutors are entitled to absolute immunity from liability in child abuse or neglect cases regardless of whether there is a rational basis for their decisions concerning the accused and regardless of their motives. They are above reproach as long as they are acting in a prosecutorial capacity.[22] Generally, government officials may not be held accountable for their actions in this area if their actions are of a prosecutorial nature.[23] If, however, the actions of government officials are administrative or investigatory, then the officials may not enjoy the same level of immunity.

B. Qualified Immunity

Although government officials involved in child abuse investigations may not have the protection of absolute immunity, they may in some cases be afforded qualified immunity. In *Landstrom v. Illinois Department of Children and Family Services*,[24] two children and their parents brought suit claiming that their constitutional rights had been violated by various state and local school officials during a child abuse investigation.[25] The investigation stemmed from complaints by the younger child of soreness and the subsequent verbal and physical examination of that child by school officials as well as the verbal examination of her older sister.[26] The court found that government officials "performing discretionary functions are shielded from liability for civil damages unless their conduct violates clearly established statutory or

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[20] *Achterhof*, 886 F.2d at 830-31. The court found these functions not to be "intimately related with the judicial process." *Id.* at 831.

[21] *Id.* The judgment of dismissal from the district court was reversed. *Id.*

[22] *See Imbler*, 424 U.S. at 428 (prosecutors absolutely immune); *see also* Stump v. Sparkman, 435 U.S. 349, 355 (1978) (judges absolutely immune); Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (same).

[23] Butz v. Economou, 438 U.S. 478, 515 (1978) (agency officials performing functions prosecutorial in nature should be able to claim absolute immunity).

[24] 892 F.2d 670 (7th Cir. 1990).

[25] *Landstrom*, 892 F.2d at 671. The district court dismissed the claims on the basis that the officials were entitled to qualified immunity. *Id.*

[26] *Id.* at 671-72. The examination of the younger child occurred at school and involved the removal of her clothing. *Id.* The verbal examination of the older child occurred after the express instructions of the parents not to continue this investigation. *Id.*

constitutional rights of which a reasonable person would have known."[27]

However, even though the same standard was imposed upon government officials in *Good v. Dauphin County Social Services for Children and Youth*[28] as a prerequisite for invoking the protection of the doctrine of qualified immunity, the court held that the doctrine could not be applied to municipal or county agencies.[29] The suit stemmed from an improper search of a mother's home after she was suspected of child abuse.[30] The employees were found to be entitled to qualified immunity unless they should have known that their actions violated a clearly established constitutional right.[31] However, the court found that if the employees were acting in conformity with established agency guidelines or policies, then the agencies could be found liable.[32]

In *Stoneking v. Bradford Area School District*,[33] the court held school officials to the same reasonableness standard and found that upon the facts presented the school officials were not entitled to qualified immunity.[34] In *Stoneking*, the sexual abuse of a student was repeatedly reported to the principal and assistant principal of a school.[35] Since the officials discouraged and minimized reports of sexual miscon-

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[27] *Id.* at 675 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The court found that the plaintiffs must show that the school officials should have reasonably known that they were violating the constitutional rights of the plaintiffs. *Id.* The court did not address the reasonableness of the search for fourth amendment purposes. *Id.* at 676. "It is precisely the function of qualified immunity to protect state officials in choosing between such alternatives, provided that there is an *objectively reasonable* basis for their decision, whichever way they make it." Emrik v. Chemung County Dep't of Social Serv., 911 F.2d 863, 866 (2d Cir. 1990) (emphasis added). The *Emrik* court found a child protective services caseworker qualified to utilize the defense of qualified imunity and escape liability for temporarily removing a child from his parents' custody and having his leg x-rayed. *Emrik*, 911 F.2d at 866-67.

[28] 891 F.2d 1087 (3d Cir. 1989).

[29] *Good*, 891 F.2d at 1096. The district court had dismissed the complaints against these agencies based upon qualified immunity, but the Third Circuit reversed. *Id.*; *see also* Owen v. City of Independence, 445 U.S. 622, 651 (1980) (qualified immunity does not apply to municipal or county agencies).

[30] *Good*, 891 F.2d at 1090. The search occurred at 10 p.m. without a warrant or court order. *Id.* at 1089-90.

[31] *Id.* at 1096. The record was found incomplete to make this determination. *Id.*

[32] *Id.* The plaintiff must also prove that the harm was caused by these policies. *Id.*

[33] 882 F.2d 720 (3d Cir. 1989).

[34] *Stoneking*, 882 F.2d at 731. The court found that the officials had taken affirmative acts to further Stoneking's injury and that they should have known that these policies were unacceptable. *Id.*

[35] *Id.* at 722. The abuse occurred over a period of three years and several reports were submitted to the officials. *Id.*

duct, the court found them ineligible for qualified immunity from liability.[36] However, since there were no affirmative acts by the superintendent of the school, the court found him to be protected from liability by the doctrine.[37]

Another instance in which a government official forfeited the protection of the doctrine of qualified immunity occurred in *Snell v. Tunnell*.[38] This case involved the removal of children from a foster home after allegations of abuse by the foster parents surfaced.[39] Evidence showed that the social worker in this case as well as the agency attorney fabricated stories of child pornography and prostitution concerning the children in the care of the Snells.[40] The court held that "even in the context of a child abuse investigation, a reasonable public official would have known that using known false information to secure an order to justify entry and search of a private home would violate the fourth amendment's proscription on unreasonable searches and seizures."[41]

In summary, government officials are entitled to qualified immunity for their actions against an accused even if those actions are unfounded by fact unless a reasonable official should have known that those actions violated a clearly established constitutional right. This is a difficult burden of proof for those accused of child abuse or neglect and seldom yields a successful claim.

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[36] *Id.* at 727. The court found that reasonable officials would have understood a student's right to be free from sexual molestation. *Id.*; *see also* Ingraham v. Wright, 430 U.S. 651, 673 (1977) (considering corporal punishment in schools, the Supreme Court held that individuals have "a right to be free from . . . unjustified intrusions on personal security"); Rochin v. California, 342 U.S. 165, 172 (1952) (conduct which "shocks the conscience" is violative of due process rights).

[37] *Stoneking*, 882 F.2d at 731. The court found no evidence indicating that the superintendent acted unreasonably. *Id.*

[38] 920 F.2d 673 (10th Cir. 1990).

[39] *Snell*, 920 F.2d at 677. The only legitimate allegations concerned lack of supervision. *Id.*

[40] *Id.* at 683. This fabrication occurred in a successful attempt to obtain a court order for removal of the children. *Id.*

[41] *Id.* at 700. *But see* Franks v. Delaware, 438 U.S. 154, 171-72 (1978) (if after disregarding falsity there remains "sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required"); Myers v. Morris, 810 F.2d 1437, 1457 (8th Cir. 1987) (subjective bad faith of officer does not defeat qualified immunity if conduct is objectively reasonable).

C. *Constitutional Rights of the Accused in Relation to the Removal of an Accused's Child from the Home*

An early decision concerning the due process rights of an individual accused of child abuse or neglect occurred in *Roe v. Conn.*[42] An Alabama statute authorized seizure of a child if it appeared that the child was in such a condition that the child's welfare required a seizure.[43] This case concerned the removal of a white child who was part of an interracial family unit and lived in a black neighborhood.[44] The court found that the statute in question was unconstitutionally vague and constituted an infringement of the fundamental right to family integrity.[45] In addition, the court held that the fact that a child might be socially or culturally disadvantaged did not rise to the level of harm that is required for a state to terminate parental rights.[46] Since the child in this situation was not in danger of immediate or threatened harm, the court found the accused to be entitled to prior notice and a hearing.[47]

However, in *Weller v. Department of Social Services for Baltimore*,[48] the court held that an accused is not denied substantive due process when his child is removed from his home in an emergency situation without notice or hearing.[49] Even so, the agency must provide the accused with prompt due process following the emergency removal.[50] In this case, the accused was not granted a hearing for four months, and the court found such conduct to be violative of his constitutional

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[42] 417 F. Supp. 769 (M.D. Ala. 1976).

[43] *Roe*, 417 F. Supp. at 778-79. The statute authorized removal of children from "improper" homes. *Id.* at 779.

[44] *Id.* at 774. The child was illegitimate and the man with whom the mother was living was not the natural father of the child. *Id.*

[45] *Id.* at 778. The right to family integrity is "accorded strong protection from state interference." *Id.* at 779; *see also* Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 21 (S.D. Iowa 1975) ("[D]ue process requires the state to clearly identify and define the evil from which the child needs protection").

[46] *Roe*, 417 F. Supp. at 781. The state must show not only that the child is disadvantaged but that he is being "harmed in a real and substantial way." *Id.* at 779.

[47] *Id.* at 778. The child in this case was in good physical condition with no signs of abuse. *Id.*

[48] 901 F.2d 387 (4th Cir. 1990).

[49] *Weller*, 901 F.2d at 391. The court noted that it did not shock the conscience of the court to know that defendants removed a child from the custody of a parent suspected of abusing him. *Id.*

[50] *Id.* at 396. The court held that the state has the burden to "initiate prompt judicial proceedings." *Id.*

rights.[51]

An indigent parent may be entitled to an additional constitutional due process right in matters affecting parental rights that stem from child abuse or neglect allegations. In *State ex rel. T.H. by H.H. v. Min*,[52] the court held that an indigent parent does not have an absolute right to counsel in proceedings affecting parental rights, but he may be so entitled as a matter of due process.[53] In this case, the indigent parents were found to have been deprived of due process because their education, intelligence, and personal experience prevented them from understanding the proceedings that might deprive them of custody of their child.[54] The court, therefore, ordered that the parents be appointed counsel and granted a rehearing.[55]

Hence, case law indicates that in a true emergency situation an accused is not deprived of due process when a hearing is not granted to him before removal of the child from the home. Due process does guarantee a prompt hearing after an emergency removal of a child. In addition, due process may entitle an indigent parent to assistance of counsel in hearings affecting parental rights in some cases.

D. Constitutional Rights of the Accused in Proceedings to Terminate Parental Rights

The Supreme Court set forth the minimum standard of proof required in proceedings to terminate parental rights in *Santosky v. Kramer*.[56] This case involved the constitutionality of the New York Family Court Act that provided for termination of parental rights upon a finding that the child is permanently neglected.[57] The act required that the evidence be weighed under a fair preponderance of the

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[51] *Id.* Additionally, the accused alleged that his repeated requests for a hearing were ignored. *Id.*

[52] 802 S.W.2d 625 (Tenn. App. 1990).

[53] *Min*, 802 S.W.2d at 626. The court found that these determinations must be made on a case-by-case basis. *Id.*; *see also* Lassiter v. Department of Social Serv., 452 U.S. 18, 31 (1981) (interests at stake play large part in determining whether due process requires appointed counsel for indigent parents).

[54] *Min*, 802 S.W.2d at 627. The court noted that the parents were distressed and disoriented at the hearing and simply rambled instead of asking relevant questions. *Id.* In addition, the mother made a remark to the court potentially "exposing herself to criminal liability." *Id.*

[55] *Id.* The court also ordered that if the state did not grant a rehearing within a reasonable time, the child must be released from custody. *Id.*

[56] 455 U.S. 745 (1982).

[57] *Santosky*, 455 U.S. at 747. The Court noted that less proof was required in New York to show "permanent neglect" than in most states. *Id.* at 749.

evidence standard.[58] The Court deemed this standard to be a violation of the parents' due process rights and held that the minimum standard to be used was one of "clear and convincing evidence."[59] The Court based its decision upon the fact that the private interest affected is commanding and the loss threatened is permanent.[60] In addition, the Court relied upon the fact that the preponderance standard did not fairly allocate the risk of mistake between the state and the natural parents.[61]

In *Lassiter v. Department of Social Services of Durham County, North Carolina*,[62] a parental rights termination proceeding involving an indigent parent, the Supreme Court found that the parent was not entitled to appointed counsel.[63] The Court's decision here was based upon the fact that, in this instance, the appointment of counsel could not have made a determinative difference.[64] The parent in question lost custody of her child on the basis of neglect and was subsequently convicted of an unrelated second-degree murder.[65] She was in prison at the time of the hearing and had made no attempt to contact the child in three years.[66] The *Lassiter* Court confirmed that even in cases of termination of parental rights, an indigent is not necessarily entitled to

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[58] *Id.* at 747. In New York, "the factual certainty required to extinguish the parent-child relationship is no greater than that necessary to award money damages in an ordinary civil action." *Id.*

[59] *Id.* at 768-69. The Court held that a "clear and convincing" standard gives the fact-finder the level of certainty necessary to satisfy due process. *Id.* at 769. The Court relied upon the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as rationale for its decision. *Id.* at 758. The Court found that "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight." *Id.*

[60] *Santosky*, 455 U.S. at 758. The Court noted that a parental right to custody is "far more precious" than any property interest. *Id.*

[61] *Id.* at 761. The Court noted that parents involved in such proceedings are usually poor, uneducated, or members of minority groups subject to class bias. *Id.* at 763. This makes findings of erroneous facts more likely. *Id.*

[62] 452 U.S. 18 (1981).

[63] *Lassiter*, 452 U.S. at 24. The Court noted that an indigent's right to appointed counsel exists only in cases where he may lose his physical liberty. *Id.* at 25; *see* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (counsel must be provided before any indigent may be sentenced to prison); *In re* Gault, 387 U.S. 1, 41 (1967) (juvenile has right to appointed counsel when proceedings may result in commitment to institution).

[64] *Lassiter*, 452 U.S. at 33. The Court held that a demonstration by the parent of disinterest may be considered in determining when to appoint counsel. *Id.*

[65] *Id.* at 20. The child was malnourished and in need of medical attention. *Id.* at 22.

[66] *Id.* at 21. Lassiter was brought to the hearing from prison. *Id.* She did not assert that she was indigent at that time. *Id.* at 22.

appointed counsel as a matter of due process.[67]

III. The Rights of the Victim

A. *The Duty of the State to Protect the Due Process Rights of the Victim*

Although some judicial progress has been made in recent years to protect the rights of the abused child, the state of children's rights under the due process clause of the fourteenth amendment still leaves much to be desired. The United States Supreme Court has refused to find that reckless failure of a state to protect children from violent physical harm is a violation of the due process rights of the child unless the child is in the custody of the state.

In *DeShaney v. Winnebago City Social Services Department*,[68] the child victim was subjected to a series of beatings by his father, the custodial parent.[69] The county department of social services was aware of this situation and investigated the complaints.[70] The department found that the child was likely the victim of abuse and temporarily removed him from the custody of his father, but soon returned the child to the father's custody even though the father had not complied with the conditions set forth for the child's return.[71] After the return, the child's father beat him so severely that he suffered permanent brain damage and is now profoundly retarded.[72] The Court held that the agency's failure to provide the child with adequate protection did not violate his rights under the substantive component of the due process clause.[73] The Court reasoned that the clause does not impose a duty on the state to provide members of the public with adequate protective services.[74] The Court concluded that such a duty can arise only

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[67] *Id.* at 25. The Court employed a standard of "fundamental fairness" in determining the right to appointed counsel for indigents in these proceedings. *Id.* at 26-27.

[68] 489 U.S. 189 (1989).

[69] *DeShaney*, 489 U.S. at 193. The father was subsequently convicted of child abuse. *Id.*

[70] *Id.* at 192-93. The child had been admitted to the hospital on numerous occasions and reports of suspected abuse were filed by hospital personnel. *Id.*

[71] *Id.* at 192. The father had entered into a voluntary agreement with the agency to comply with certain conditions before the child was returned. *Id.*

[72] *Id.* at 193. The child and his natural mother brought this claim under 42 U.S.C. § 1983 (1981). *DeShaney*, 489 U.S. at 193.

[73] *DeShaney*, 489 U.S. at 197. The Court concluded that the clause was a limitation on a state's ability to act but did not impose an affirmative obligation on the state. *Id.* at 195.

[74] *Id.* The Court also rejected the contention that a "special relationship" existed

when a state has imposed upon an individual's freedom to act on his own behalf and since the child was not in the custody of the state, no duty had arisen.[75] However, the Court suggested that the agency may be liable under state tort law.[76]

Since it was well-settled law prior to *DeShaney* that the state had an affirmative duty to those in its custody,[77] this opinion did not in any way expand the rights of children. Thus, the Court set forth the principle of "affirmative governmental power without affirmative governmental duty."[78]

B. The Duty of School Authorities to Prevent Child Abuse

The Supreme Court's reasoning concerning the absence of an affirmative duty of the state to protect its citizens has been applied to school officials in some jurisdictions. In *J.O. v. Alton Community Unit School District 11*,[79] the parents of sexually abused children brought an action against school officials for violation of the children's liberty interests as a result of molestation by a teacher.[80] The court found that school officials did not have an affirmative duty under the due process clause to prevent sexual abuse by teachers unless the children were required to attend the school and that requirement rendered the children incapable of caring for themselves.[81] Once again the court addressed the issue of whether a "special relationship" existed between the children and the school authorities.[82] The court found that the only "special relationship" that would give rise to an affirmative constitutional duty is one in which the individual has been declared helpless by

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which gave rise to an affirmative duty in this case. *Id.* at 197.

[75] *Id.* at 199-200. The Court found no affirmative duty exists simply because the state has knowledge of the child's danger. *Id.* at 200.

[76] *Id.* at 201-02. This duty may arise by a voluntary undertaking to protect the child. *Id.* at 201.

[77] *See* Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (state must provide safe conditions for those involuntarily committed to mental institutions); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987) (state's action of taking child into its custody places obligation on state to insure child's safety).

[78] Lucca, DeShaney v. Winnebago County Department of Social Services: *U.S. Supreme Court's Decision Reflects the Poor State of Children's Due Process Rights*, 17 W. ST. U.L. REV. 445, 466 (1990).

[79] 909 F.2d 267 (7th Cir. 1990).

[80] *J.O.*, 909 F.2d at 268. The parents also brought an action under state tort law. *Id.*

[81] *Id.* at 272. The court found that the children and their parents still had "substantial freedom to act." *Id.*

[82] *Id.* The court also noted the prohibition against the doctrine of respondeat superior in section 1983 claims. *Id.*

the state.[83] If a duty is owed to children by school authorities, the court suggested that it should be addressed in state tort actions and not in a constitutional right setting.[84]

In conclusion, the child victim is guaranteed no protection from violent abuse either by the state or by his school. The only exception, and the only protection for the child, is in cases where the state has rendered him incapable of caring for himself by taking him into its custody.

C. The Child Victim as a Witness

The minute progress in the area of children's rights has been accomplished in the area of the child victim as a witness. The Court has recognized the trauma likely to be suffered by the child victim who must testify in a judicial proceeding. The child is likely to become unable to testify or may suffer irreparable psychological harm after testifying. In some cases, the Court has found these concerns to outweigh the rights of the accused under the confrontation clause of the sixth amendment.

In *Pennsylvania v. Ritchie*,[85] a father was charged with various sexual offenses against his minor daughter.[86] During pre-trial discovery, the father's attorney subpoenaed the Child and Youth Services Agency to produce their file on his daughter.[87] The agency refused, claiming that the information was privileged and confidential.[88] The trial judge refused to order disclosure but was reversed by the Pennsylvania Supreme Court.[89] The United States Supreme Court evaluated the issue under due process principles and determined that the defendant is entitled only to information in possession of the government that is both favorable to him and "material to guilt or punishment."[90] Ac-

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[83] *Id.* The court recognized this duty in cases of incarcerated prisoners and involuntarily committed mental patients. *Id.*

[84] *Id.* The court noted that the state of Illinois had recognized such an action in tort. *Id.*; *see, e.g.*, Enersole v. Wasson, 80 Ill. App. 3d 94, 398 N.E.2d 1246 (1980) (student allowed to bring state tort action against school district for injuries sustained in teacher's assault).

[85] 480 U.S. 39 (1987).

[86] *Ritchie*, 480 U.S. at 43. Ritchie's daughter claimed that she had been assaulted by her father two or three times a week for the past four years. *Id.*

[87] *Id.* Ritchie requested information concerning his present charges as well as past allegations that were contained in the file. *Id.*

[88] *Id.* The refusal was pursuant to Pennsylvania statute. *Id.*

[89] *Id.* at 46. The court concluded that denial of access to the file violated both the confrontation clause and the compulsory process clause. *Id.*

[90] *Id.* at 56-57. The Court concluded that the Pennsylvania Supreme Court had not

cordingly, the Court ordered the trial court to review the file and determine whether such information was contained therein;[91] if so, the Court demanded that the defendant be given a new trial.[92] In addition, the Court noted that a full disclosure of such information would defeat the state's compelling interest in protecting its child abuse information.[93]

The principles of the confrontation clause were employed to determine the constitutionality of the methods used in obtaining the testimony of child victims in *Coy v. Iowa*.[94] In *Coy*, the defendant in the proceeding was charged with sexually assaulting two thirteen-year-old girls.[95] During the course of the trial, the court granted the state's motion to allow the victims to testify behind a screen.[96] The screen prevented the victims from seeing the accused and only allowed the accused to hear and see the victim's shaded appearance.[97] The trial court rejected the defendant's argument that this violated his rights under the confrontation clause of the sixth amendment.[98] Subsequently, the defendant's conviction was affirmed by the Iowa Supreme Court.[99] The United States Supreme Court found this to be a violation of the defendant's rights under the confrontation clause.[100] The Court reasoned

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properly evaluated the claims. *Id.* at 56. These claims have traditionally been evaluated under due process and not the compulsory process clause. *Id.*

[91] *Ritchie*, 480 U.S. at 58. The portion of the Pennsylvania Supreme Court decision ordering remand for further proceedings was affirmed. *Id.*

[92] *Id.* If the nondisclosure was "harmless beyond a reasonable doubt," the conviction should be reinstated. *Id.*

[93] *Id.* at 60. The Court recognized the necessity of victims and witnesses being able to speak without fear of reprisal. *Id.* at 61. To combat this problem, the Court noted that the defense is afforded no constitutional right to search the state's files for material evidence. *Id.*; *see* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (criminal defendants have no general constitutional right to discovery).

[94] 487 U.S. 1012 (1988).

[95] *Coy*, 487 U.S. at 1014. The defendant was charged with sexually assaulting the victims while they were tent-camping in a neighbor's backyard. *Id.*

[96] *Id.* This action was pursuant to a recently enacted statute allowing testimony of this kind. *Id.*

[97] *Id.* at 1015. This result was accomplished through lighting adjustments. *Id.*

[98] *Id.* The defendant strenuously asserted his right to face his accuser at trial. *Id.*

[99] *Coy*, 487 U.S. at 1015. The Iowa Supreme Court based its decision upon the fact that the defendant's ability to cross-examine the witnesses was not impaired by the screen. *Id.*

[100] *Id.* The Court remanded the case for further proceedings. *Id.*; *see also* State v. Siard, 783 P.2d 895, 898-99 (Kan. 1989) (court found procedure unconstitutional where child witnesses were blocked from defendant's view and had previously testified at preliminary hearing without trauma). *But see* Smith v. Edmiston, 431 F. Supp. 941, 945 (W.D. Tex. 1977) (confrontation clause of sixth amendment does not apply to depen-

that if an exception to this right could be made, it must be based upon individualized findings of trauma to the victim, such that those concerns outweigh the defendant's right to confrontation.[101] The findings in *Coy* were generalized and, therefore, could not outweigh the defendant's constitutionally protected rights.[102]

The court in *Commonwealth v. Bergstrom*[103] relied upon this same rationale but explicitly held that the use of videotapes to record a child victim's testimony, outside the courtroom but in the presence of the defendant, would be permissible if necessary to avoid long-lasting emotional trauma to the child.[104]

Eventually, the United States Supreme Court specifically held that the confrontation clause did not prohibit a child witness from testifying outside the defendant's physical presence via one-way closed circuit television in *Maryland v. Craig*.[105] The Court once again reiterated that the determination of the necessity of testifying by such means had to be made on a case-by-case basis.[106] Furthermore, the Court found that observation of the child's behavior in the presence of the defendant and the exploration of less restrictive alternatives to this means of testifying were not necessary in the determination of whether testimony by such means was justified.[107] The case involved a defend-

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dency and neglect proceedings); *In re* Burchfield, 555 N.E.2d 325 (Ohio App. 1988) (same).

[101] *Coy*, 487 U.S. at 1021. An individualized finding is required when the exception is not well-settled. *Id.*

[102] *Id.* The finding here was based upon a legislatively imposed presumption of trauma. *Id.*

[103] 524 N.E.2d 366 (Mass. 1988).

[104] *Bergstrom*, 524 N.E.2d at 376. However, the court found a statute providing for testimony by electronic means outside the presence of the defendant violative of the state confrontational guaranty. *Id.*; *cf. Ex parte* Strickland, 550 So. 2d 1054, 1057 (Ala. 1989) (child's videotaped testimony in presence of defendant and his attorney not violative of defendant's right to confrontation); People v. Schmitt, 562 N.E.2d 377, 381 (Ill. App. Ct. 1990) (child's testimony in chambers in presence of defendant not violative of defendant's right to confrontation).

[105] 110 S. Ct. 3157 (1990).

[106] *Craig*, 110 S. Ct. at 3169. The Court determined that the trial court must hear all relevant evidence pertaining to each witness before making its determination. *Id.*; *see also* Thomas v. People, 803 P.2d 144, 148 (Colo. 1990) (expert's uncontradicted testimony that children would suffer trauma testifying in front of defendant is sufficient); State v. Chisholm, 777 P.2d 753, 759 (Kan. 1989) (court remanded to determine whether evidence of individualized finding sufficiently outweighed defendant's right to confrontation); State v. Albert, 778 P.2d 386, 389 (Kan. Ct. App. 1989) (individualized finding based upon testimony of psychologist that child with ulcer could not testify in front of defendant with any degree of detail).

[107] *Craig*, 110 S. Ct. at 3168. The witness must be traumatized not just by the court-

ant charged and subsequently convicted of sexual offenses and assault and battery arising from her operation of a preschool and abuse of the children who attended.[108] The Court upheld the conviction pending an individualized finding of necessity for each witness who testified via closed circuit television.[109]

In *Idaho v. Wright*,[110] another case involving a child victim as a witness, the Court found that the admission of a doctor's testimony under the residual hearsay exception violated the defendant's rights under the confrontation clause.[111] This case involved a mother charged with lewd conduct with a minor stemming from actions involving her two small daughters in which she and her boyfriend participated.[112] The Court noted that the younger child's statements did not fall within a traditional hearsay exception and lacked particularized guarantees of trustworthiness.[113] The state supreme court pointed out that the doctor failed to videotape the interview, asked leading questions,

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room in general, but by the presence of the defendant. *Id.* The Kansas Supreme Court dictated possible factors for finding a witness unavailable to testify in open court due to then-existing mental illness. State v. Kuone, 243 Kan. 218, 757 P.2d 289, 296 (1988). The non-exclusive list included:

> (1) the probability of psychological injury as a result of testifying; (2) the degree of anticipated injury, (3) the expected duration of the injury, and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping, or other violent act. Other factors may also be relevant.

Kuone, 243 Kan. 218, 757 P.2d 289, 296 (quoting Warren v. United States, 436 A.2d 821, 830 n.18). The court later adopted the use of these factors in determining whether a child victim is available to testify in open court. State v. Eaton, 769 P.2d 1157, 1167 (Kan. 1989). The determination that a witness is unavailable to testify is the "touchstone of the confrontation clause" and precludes its violation. Parker, *supra* note 5, at 691-92.

[108] *Craig*, 110 S. Ct. at 3158. This particular case involved the sexual abuse of one of her six-year-old students. *Id.*

[109] *Id.* at 3171. The court of appeals held that the trial court had not made the requisite finding of necessity. *Id.*

[110] 110 S. Ct. 3139 (1990).

[111] *Wright*, 110 S. Ct. at 3141. The prosecution must show that the witness is unavailable. *Id.* The Court previously set forth the requirements for admissibility of such evidence: (1) the declarant must be unavailable; and (2) the statements must bear adequate "indicia of reliability." Ohio v. Roberts, 448 U.S. 56, 66 (1980). In addition, the *Roberts* Court ruled that evidence which falls within a firmly rooted hearsay exception is presumed to be reliable. *Roberts*, 448 U.S. at 66. Evidence that does not so fall must have "particularized guarantees of trustworthiness." *Id.*

[112] *Wright*, 110 S. Ct. at 3143. The allegations made by the child were that the mother held her while the boyfriend had sexual intercourse with her. *Id.*

[113] *Id.* at 3147. The testimony could, therefore, not survive a confrontation clause challenge. *Id.*; *see also* Mancusi v. Stubbs, 408 U.S. 204, 213 (1972) (prior recorded testimony of unavailable witness must bear "assurance of reliability").

and demonstrated a preconceived idea of what the child should be disclosing.[114] Since the admission of this testimony was not harmless error, the Supreme Court affirmed the decision of the Idaho Supreme Court to reverse and remand for further proceedings.[115]

Hence, the only significant progress in the area of the rights of child victims is in the area of the child victim as a witness. The Court has encouraged citizens to report suspected abuse cases and has protected the past experiences of the victim by its decision in *Ritchie*.[116] Additionally, the Court has attempted to lessen the pain and trauma experienced by many child witnesses who are forced to testify in court by providing them with limited alternatives upon a showing of necessity.[117]

IV. Recent Legislation in Mississippi in the Area of Child Abuse

Mississippi case law indicates a history of judicial concern for the child victim as a witness. In *Williams v. State*,[118] the Mississippi Supreme Court attempted to deal with this concern by adopting a "tender years" exception for hearsay testimony.[119] However, with the court's adoption of the Mississippi Rules of Evidence, effective January

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[114] *Wright*, 110 S. Ct. at 3148. The Supreme Court refused to condone the procedural requirements mandated by the state supreme court. *Id.*

[115] *Id.* at 3153. The conviction was reversed only in relation to the younger daughter whose testimony was in question. *Id.*

[116] Note, *Confidentiality of Child Abuse Records Versus the Accused's Rights of Confrontation and Compulsion: Analysis of* Pennsylvania v. Ritchie, 15 S.U.L. Rev. 141, 158 (1988) (authored by Marcus Brown). The Court's position of confidentiality concerning prior child abuse records will further goals of obtaining child abuse reports. *Id.*

[117] Note, *A Question of Necessity: The Conflict Between A Defendant's Right of Confrontation And A State's Use of Closed-Circuit Television in Child Sexual Abuse Cases*, 46 Wash. & Lee L. Rev. 1003, 1033-34 (1989) (authored by Karen E. Havens) (some state statutes allow child witness' testimony to be recorded outside defendant's presence based upon necessity of protective trial procedure); *see* Meyers, *Little Witnesses*, Student Law., Sept. 1982, 14, 16 (judicial scholars have recognized that it is difficult to obtain reliable testimony from child witnesses).

[118] 427 So. 2d 100 (Miss. 1983).

[119] *Williams*, 427 So. 2d at 102. The court determined that:

> Hearsay testimony . . . is admissible where the complainant is of "tender years" if her statement is shown to have been spontaneous and without indication of manufacture, and if any delay in making the complaint is excusable insofar as it is caused by fear or equally effective circumstances.

Id. at 102-03 (quoting People v. Mikula, 84 Mich. App. 108, 116, 269 N.W.2d 195, 199 (1978)). The court, therefore, found the hearsay testimony concerning the rape of an eleven-year-old child admissible with the exception of remarks made by the child which identified her assailant. *Id.* at 103.

1, 1986, all inconsistent evidentiary rules including the "tender years" exception to hearsay were repealed.[120] As a result, Mississippi courts struggled to vindicate the child witness by allowing her testimony under one of the enumerated exceptions to hearsay in the rules.[121] The Mississippi Legislature immediately responded to the problems of the child witness left unsolved by the new Mississippi Rules of Evidence.[122] However, the authority to regulate such procedures has "long been recognized" as a power belonging exclusively to the Mississippi Supreme Court.[123] Reacting to legislative as well as judicial concern, the court amended the rules to include rule 804(a)(6),[124] rule 617,[125] and rule 803(25),[126] effective on March 27, 1991.[127]

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[120] MISS. R. EVID. 1103 (1986).

[121] *See* MISS. R. EVID. 803 (1986) (hearsay exceptions). Courts had the option of admitting a child's statements as an excited utterance under rule 803(2) or as statements made for the purpose of medical diagnosis or treatment under rule 803(4) or, as a last resort, under the "catch-all" exception of rule 803(24). Mitchell v. State, 539 So. 2d 1366, 1369-71 (Miss. 1989); *see* Leatherwood v. State, 548 So. 2d 389, 400 (Miss. 1989) (only option for admitting statements made by victim to family and teacher is 803(24)); *see also* Hosford v. State, 560 So. 2d 163, 167 (Miss. 1990) (victim's statements to child therapist admissible to rebut charges of recent fabrication or confusion under 801(d)(1)). *But see* Lambert v. State, 574 So. 2d 573, 577 n.2 (Miss. 1990) (child's statements to nurse inadmissible under 801(d)(1) since child testified subsequent to nurse).

[122] *See* MISS. CODE ANN. §§ 13-1-401 to -415 (Supp. 1991) (special provisions for admitting out-of-court statements by children).

[123] *Mitchell*, 539 So. 2d at 1371 (citations omitted). In *Mitchell*, the court dictated that the admissibility of a child's out-of-court statements could only be determined by the Mississippi Rules of Evidence. *Id.* at 1371-72. *But see* State v. D.R., 109 N.J. 348, 537 A.2d 667, 681 (1988) (proper way to adopt such rules is through legislature).

[124] MISS. R. EVID. 804(a)(6). This amendment provides that a declarant is unavailable "[i]n the case of a child, because of the substantial likelihood that the emotional or psychological health of the witness would be substantially impaired if the child had to testify in the physical presence of the accused." *Id.*

[125] MISS. R. EVID. 617. This amendment allows a child victim to testify via closed-circuit television if "there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court and, in the case of a criminal prosecution, if compelled to testify in the presence of the accused." *Id.*

[126] MISS. R. EVID. 803(25). The judicially-created tender years exception was restated as:

> (25) Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness; provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Id.

The court recently dictated guidelines for application of the new amendments in *Griffith v. State*.[128] In *Griffith*, the court noted that when a child witness is found unavailable under rule 804(a)(6), the special provisions of rule 617 which allow the child to testify on closed-circuit television should be considered.[129] The court instructed the state to make an "adequate showing of necessity" to justify employing the procedure. The validity of this showing must be determined by the trial court after hearing evidence concerning whether the procedure is necessary to protect this *particular* child witness.[130] The trial court must find that the child will be traumatized, not by the courtroom generally, but by the presence of the defendant.[131] In addition, the trial court must find that the emotional distress suffered by the child is more than de minimis.[132] However, the court noted that even if the child's physical presence is not required in the courtroom, the child may still be unable to communicate in a trial setting.[133] Once the trial court determines that the child is not available to testify, the court should consider the admissibility of the child's out of court statements under rule 803(25).[134]

V. Child Abuse As It Relates to the Indigent

The role of the indigent in child abuse cases cannot be ignored. Most studies are in agreement that almost one-third of abused children live in single-parent households and are on public assistance. The fig-

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[127] *Id.*

[128] 584 So. 2d 383 (Miss. 1991).

[129] *Griffith*, 584 So. 2d at 387.

[130] *Id.*; *see also* Fricke v. State, 561 So. 2d 597, 598 (Fla. Dist. Ct. App. 1990) (allowing child witness to testify via closed-circuit television violative of right to confrontation absent case-specific finding of necessity).

[131] *Griffith*, 584 So. 2d at 387; *see* State v. Crandall, 577 A.2d 483, 485 (N.J. 1990) (hearing required to show child is traumatized by presence of defendant and not courtroom in general).

[132] *Griffith*, 584 So. 2d at 387. The child must show more than mere "nervouseness of excitement or some reluctance to testify." *Id.*

[133] *Id.* In such a case, closed-circuit testimony is not feasible. *Id.*

[134] *Id.* at 388. Rule 803(25) requires corroborating evidence where the child is unavailable as a witness. *Id.* However, the court noted that the statements must also bear "particularized guarantees of trustworthiness." *Id.* The court suggested a nonexclusive list of factors for determining reliability. *Id.* The list included: (1) spontaneity and consistent repetition; (2) mental state of the declarant; (3) use of terminology unexpected of a child of similar age and; (4) lack of motive to fabricate. *Id.* (quoting Idaho v. Wright, 110 S. Ct. 3139 (1990)).

ure rises to almost one-half for neglected children.[135] Many studies blame poverty for the parents' behavior. In any event, most concur that "poverty exposes parents to the increased likelihood of additional stresses that may have deleterious effects upon their capacities to care adequately for their children."[136]

A national study of child welfare agencies found that social workers more "frequently recommended" removal of the child from the home and placement of the child in foster care in neglect cases because they found abusive parents to be "more amenable to treatment."[137] It is also well-settled that long-term foster care can do irreparable damage between parent and child. The family unit in these situations is already weak and an extended separation may leave the parents completely unable to cope with the children when they return. Some commentators believe foster care to often be more harmful than the original environment.[138]

Attorneys should be aware that the laws of most states expressly prohibit a determination of neglect based solely on the parents' poverty. It is also noteworthy, as previously discussed, that due process may guarantee an indigent parent the right to assistance of counsel. An attorney for an indigent child or indigent parents should consider the argument that compensatory services are a more appropriate dispositional alternative than foster care in cases of neglect.

VI. Conclusion

This comment has addressed the current state of Mississippi law in the areas of the rights of the accused in child abuse procedures, the rights of the child victim in child abuse cases, and the special problems of the indigent in both situations.

The law today reflects that the rights of the accused and the rights of the victim in these cases are often conflicting. This conflict requires careful judicial scrutiny in balancing the competing interests.

In summary, the law will be changing rapidly in these areas and attorneys should keep abreast of developments. Attorneys should also bear in mind the definite correlation between the occurrence of child

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[135] American Humane Ass'n, *supra* note 9.

[136] Giovannoni & Billingsley, *Child Neglect Among the Poor: A Study of Parental Adequacy in Families of Three Ethnic Groups*, 49 Child Welfare 196, 204 (1970).

[137] *Id.* at 221 (citing U.S. Children's Bureau, *National Study of Social Services to Children and Their Families*, 92-95 (Dep't of Health, 1979)).

[138] *See, e.g.*, J. Goldstein, A. Freud & A. Solnit, Before the Best Interests of the Child 13 (1980).

abuse or neglect and the indigent, a correlation which may result in special considerations for either the indigent victim or accused.

Cynthia Langston Lott

ERISA AND BANKRUPTCY: CAN CREDITORS REACH A CHAPTER 7 DEBTOR'S PENSION?

I. Introduction

The current bankruptcy law has produced an unfortunate trap for many unwary debtors who have pension plans which are qualified under the Employee Retirement Income Security Act of 1974 (ERISA).[1] These pension plans are protected from the reach of creditors outside of bankruptcy through the anti-alienation language that ERISA requires in every plan. Federal bankruptcy exemptions also allow a debtor to exempt certain funds held in an ERISA pension plan from the claims of creditors in bankruptcy. However, the Bankruptcy Code allows the states to "opt out" of the federal exemption scheme and set up the states' own exemptions.[2] Thus, the debtor may not be able to choose the federal exemptions at all. In fact, in a majority of states debtors are confined to exemptions provided by state law and other federal nonbankruptcy laws. Many states do, however, provide for the exemption of qualified ERISA plans. The problem arises because ERISA was designed to preempt all state and local laws in the area of pension regulation. Creditors have successfully argued that this preemption extends to the state bankruptcy exemption of an ERISA pension plan. Thus, debtors are discovering that the law that was designed as a shield for their retirement funds has become a sword used to take these funds away. The Fifth and Ninth Circuit Courts of Appeals have each handed down decisions addressing the preemption of state exemption laws by ERISA. In *Heitkamp v. Dyke* (*In re Dyke*),[3] the Fifth Circuit upheld the validity of a Texas statute exempting retirement plans, while the Ninth Circuit's decision in *Pitrat v. Garlikov*[4] found Arizona's exemption preempted by ERISA.

Several different issues arise in the complex interplay between ERISA and the Bankruptcy Code. The first threshold question is whether ERISA pension plans are property of the bankruptcy estate. Congress gave a very broad definition to the property to be included in the bankruptcy estate, stating that it included "all legal and equitable

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[1] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)).

[2] 11 U.S.C. § 522 (1988); *see infra* notes 16-17 and accompanying text.

[3] 943 F.2d 1435 (5th Cir. 1991).

[4] 1991 Westlaw No. 213896 (9th Cir. October 25, 1991).

interests of the debtor in property as of the commencement of the case."[5] One limited exception to this exists for property where there is a restriction on the transfer of the debtor's interest in a trust that is enforceable under *applicable nonbankruptcy law*.[6] The circuit courts are split as to whether ERISA constitutes "applicable nonbankruptcy law." The second issue is whether the ERISA plan will be exempt if it is indeed property of the bankruptcy estate. Section 522(b)(2)(A) provides that property exempt under other federal law will be exempt in bankruptcy. This question will be dealt with in detail since the Fifth Circuit's position, as stated in *Goff v. Taylor* (*In re Goff*),[7] is that an ERISA pension plan is property of the bankruptcy estate.

This comment will first briefly discuss the general background of ERISA and the portion of the Bankruptcy Code relevant to the preemption issue. The comment then moves to an analysis of the question of exclusion of the pension fund from the estate under section 541 and includes a look at the two divergent lines of circuit court cases. The *Goff* line of cases only excludes plans which qualify as spendthrift trusts. However, this comment will show that this is a rather elusive definition. The second question is to determine whether section 522 provides the debtor with an exemption for the plan. Once again, the *Goff* case provides the point of departure for this issue. Third, this comment will look at the reasoning of several Supreme Court decisions which have dealt with the preemption of state laws of ERISA. These cases lay the foundation for the later interpretation of the preemption issue in the bankruptcy context involved here. Fourth, this comment will detail two cases, *In re Komet* and *In re Volpe*, which give in-depth attention to the problem of preemption of state bankruptcy exemptions. Both of these cases originated from the Western District of Texas and involve very similar fact situations. The *Volpe* decision and a companion case, *In re Dyke*, were recently decided by the Fifth Circuit. The *Volpe* decision provides an interesting look into this complex issue. The bankruptcy court, district court, and Fifth Circuit all found for the debtor, but the reasoning in each opinion was starkly different. The current law in Mississippi is also covered in this comment. The Mississippi Legislature passed two new laws in the 1991 session in an attempt to address the unsure situation. Finally, this comment will present some ideas for solutions to the present inconsistent situation.

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[5] 11 U.S.C. § 541(a)(1) (1988).

[6] 11 U.S.C. § 541(c)(2) (1988) (emphasis added).

[7] 706 F.2d 574 (5th Cir. 1983).

II. ERISA Policy Considerations

The primary policy behind ERISA was to insure that workers who were promised a pension upon retirement would actually receive the money they had been promised,[8] while not restricting the development of the private pension system.[9] ERISA was designed as a comprehensive, all encompassing statutory scheme regulating every facet of pension plans.[10] One of the mechanisms for accomplishing this goal was the requirement that all the plans contain provisions that prevent the funds in the plans from being assigned or alienated in any way.[11] Although this comment centers on presumption in the bankruptcy context, ERISA's preemptive reach is certainly not limited to this one area.[12] ERISA prevents creditors outside of bankruptcy from reaching

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[8] 120 Cong. Rec. 29,192 (1974) (statement of Rep. Perkins).

[9] H.R. Rep. 807, 93rd Cong., 2d Sess. 8, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4676-77.

[10] ERISA contains sections which include: extensive reporting and disclosure sections, 29 U.S.C. §§ 1021-31; regulations on vesting, participation, and funding requirements, 29 U.S.C. §§ 1051-86; administration and enforcement, 29 U.S.C. §§ 1131-45; and the duties of fiduciaries, 29 U.S.C. §§ 1101-14. The stated policy of ERISA is in section 1001a(c), which reads:

> It is hereby declared to be the policy of this Act-
>
> (1) to foster and facilitate interstate commerce,
>
> (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,
>
> (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and
>
> (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

29 U.S.C. § 1001a(c)(1988).

[11] The restrictions on assignment and alienation are found in 29 U.S.C. § 1056(d)(1) which simply states, "[E]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The enforcement of the anti-alienation requirements was delegated to the Treasury Department. The Internal Revenue Code section 401(a)(13) provides for the disqualification of a plan if the benefits may be or actually are assigned or alienated. The Treasury Department regulations read:

> Under section 401(a)(13) [of the Internal Revenue Code], a trust will not be qualified unless the plan of which the trust is a part provides that the benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated, or subject to attachment, garnishment, levy, execution, or other legal or equitable process.

Treas. Reg. § 1.403(a)-13(b)(1)(1985).

[12] *See, e.g.*, Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. Pitt. L. Rev. 427 (1987); Kilberg and Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 Tex. L. Rev. 1313 (1984); Note, *ERISA, Employees, and Creditor's Rights: A Search For A Consistent Theme*, 67 Wash. U.L.Q. 461, 464-76 (1989).

assets of a pension plan. ERISA also provides that any law that "relates to" it will be preempted.[13] This preemption is discussed in detail in section VI below.

III. General Bankruptcy Scheme

The general scheme set up by the Bankruptcy Code is intended to include as much property in the estate as possible, while at the same time preventing the debtor from being left with so little as to be a burden on the estate. In often stated terms, the goals are to give a debtor a "fresh start" but not a "head start." The Bankruptcy Code provides in section 541(a) that the bankruptcy estate includes all of the debtors legal or equitable interests in any property except certain limited exceptions.[14] The exception that is relevant to this comment is in section 541(c)(2) of the Bankruptcy Code, which states that a trust subject to a restriction on its transfer outside of bankruptcy will not become part of the estate.[15] Thus, unless an ERISA pension plan is

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[13] 29 U.S.C. § 1144(a)(1988). This section will be dealt with in detail later in this comment. The section reads in part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a)(1988).

Senator Williams stated:

> It should be stressed that with the narrow exceptions specified in [ERISA], the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments.

120 Cong. Rec. 29,933 (1974).

[14] 11 U.S.C. § 541(a)(1988). Generally, this section is interpreted very broadly so that in most cases any property the debtor has an interest in will become part of the estate.

[15] *Id.* at § 541(c). This section reads in part:

> (c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—
>
> (A) that restricts or conditions transfer of such interest by the debtor
>
> . . .
>
> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

deemed to meet this requirement, it is part of the estate.

Another facet of the bankruptcy scheme is contained in sections that exempt property of the estate from the reach of the creditors.[16] The Bankruptcy Code provides "generic" federal exemptions in section 522(d).[17] The second paragraph of section 522(b) gives the authority to the states to create a list of exemptions for their residents. The states that have set up their own exemptions in lieu of the federal ones are said to have "opted out" of the federal system.[18] The debtor must then

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Id.

[16] The exemptions provisions is in 11 U.S.C. section 522, which states in relevant part:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . . Such property is-
>
> (1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable.

11 U.S.C. § 522(b) (1988).

[17] 11 U.S.C. § 522(d) (1988). There are exemptions for basic personal property and such things as a small amount of equity in a car and home. Generally, the list consists of a basic amount needed to keep the debtor from being destitute. The statute also includes, to the extent reasonably necessary for support of the debtor, an exemption for pension plans. The exemption in section 522(d)(10)(E) reads:

> (E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under . . . the Internal Revenue Code of 1986.

Id. at § 522(d)(10)(E).

[18] 11 U.S.C. § 522(b)(2)(A) (1988). The states choosing to set up their own exemption plan are known as "opt out" states. Mississippi is one of approximately 35 states that have "opted out" of the federal exemption plan to create their own exemptions. The states that have opted out are Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. 3 COLLIER ON BANKRUPTCY ¶ 522.02 n.4a (15th ed. 1990). Mississippi residents may only use the state exemptions. MISS. CODE ANN. § 85-3-2 (1972). Therefore, even though the Federal Bankruptcy Code allows for an exemption of ERISA pension benefits, citizens of Mississippi are not at liberty to

choose between the very limited federal exemptions or those exemptions provided under state and other federal law.[19] The language of section 522(b)(2) allows the states to decide whether the debtor will be able to choose between the federal and state exemptions or only the ones given by the state. Thus, since almost all of the states are "opt out" states, most debtors have only the exemptions created by their state to rely upon for their "fresh start."

IV. Are ERISA Pension Plans Property of the Bankruptcy Estate?

The determination of whether an ERISA plan can be reached by a debtor's creditors involves the resolution of two general bankruptcy issues. The threshold question is to determine if section 541(c)(2) of the Bankruptcy Code excludes the plan from the bankruptcy estate altogether. The second question involves the debtor's ability to exempt the property under section 522(b)'s "other federal law" standard. The question of whether an ERISA qualified pension plan is property of the estate has been treated by the circuit courts in a widely divergent manner. An excellent springboard for discussion of both the section 541 exclusion and section 522 exemption questions is the Fifth Circuit's 1983 seminal opinion in *In re Goff*.[20] The Seventh, Eighth, Ninth and Eleventh Circuits have followed the *Goff* decision without adding anything significant to the reasoning of that opinion.[21]

A. Section 541 Exclusion

In *In re Goff*, the Fifth Circuit concluded that the debtor's interest in a pension plan was included in the property of the debtor's bankruptcy estate.[22] Although the only question before the *Goff* court was the 541(c)(2) exclusion, the court in very strong dicta also held that the

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choose to take this exemption. The Mississippi statutes dealing with the exemptions will be discussed in more detail in the text accompanying notes 172-191.

[19] *See* 3 Collier on Bankruptcy ¶ 522.25 (15th ed. 1990).

[20] 706 F.2d 574 (5th Cir. 1983).

[21] *See* Morter v. Farm Credit Servs., 937 F.2d 354 (7th Cir. 1991); John Hancock Mut. Life Ins. Co. v. Watson (*In re* Kincaid), 917 F.2d 1162 (9th Cir. 1990); Humphry v. Buckeley (*In re* Swanson), 873 F.2d 112 (8th Cir. 1989); Daniel v. Security Pac. Nat'l Bank (*In re* Daniel), 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); Lichstrahl v. Bankers Trust (*In re* Lichstrahl), 750 F.2d 1488 (11th Cir. 1985); Samore v. Graham (*In re* Graham), 726 F.2d 1268 (8th Cir. 1984).

[22] *Goff*, 706 F.2d at 589. The analysis in *Goff* tracks a prior bankruptcy court decision, *In re Graham*, 24 Bankr. 305 (Bankr. N.D. Iowa 1982), *aff'd*, 726 F.2d 1268 (8th Cir. 1984).

plan was not exempt under section 522(b) of the Bankruptcy Code. The case arose when the debtor asserted that funds contained in his self-settled[23] Keogh plan were not part of the bankruptcy estate under 541(c)(2) of the Bankruptcy Code.[24] Section 541(c)(2) excludes property from the estate if the property is subject to a restriction on its transfer enforceable outside of bankruptcy.[25] The debtor's plans contained the restrictions on alienation and assignment required by ERISA.[26] The court held that the intent of Congress in section 541(c)(2) was very narrow and specific, even though the phrase "applicable nonbankruptcy law" is very broad.[27] The Fifth Circuit judges, apparently concluding that the statute was not clear on its face, undertook a detailed analysis of its legislative history.[28]

The court cited both the Senate and House reports which state that section 541(c)(2) "preserves restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law."[29] The court continued by noting that the House Report acknowledges that the spendthrift exception is a holdover from the prior Bankruptcy Act.[30] The judges found "more significant" another passage from the House Report, which stated:

> [T]he bill also continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable state law. The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust.[31]

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[23] A plan is self-settled if the settlor who contributes the principal of the trust and the beneficiary are the same. *See infra* notes 49-60 and accompanying text.

[24] *Goff*, 706 F.2d at 580.

[25] *Id.* The section reads as follows: "(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under *applicable nonbankruptcy law* is enforceable in a case under this title." 11 U.S.C. § 541(c)(2) (1988) (emphasis added).

[26] *Goff*, 706 F.2d at 580.

[27] *Id.* at 581.

[28] *Id.* at 585. The court felt that it was appropriate to look at the legislative history because "[t]he often-stated admonition that it may be treacherous to attach great weight to Congressional silence in interpreting its laws does not apply in this case in light of the comprehensive consideration of this issue which is revealed by this history." *Id.*

[29] *Id.* at 581 (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 369, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6325); *see also* S. Rep. No. 989, 95th Cong, 2d Sess. 83, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5869 (same text as House Report).

[30] *Goff*, 706 F.2d at 581-82.

[31] *Id.* at 581-82. (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 176, *reprinted in*

Although these passages on their face indicated a desire explicitly to extend the prior spendthrift trust exclusion, the *Goff* court held that the legislative history made it "clear that Congress intended . . . to [exclude] from the estate only those 'spendthrift trusts' traditionally beyond the reach of creditors under state law."[32] The court's conclusion, based on the legislative history, was that Congress only intended section 541(c)(2) to preserve the spendthrift exclusion which was part of the prior Bankruptcy Act.[33] The court concluded, however, that the Congressional intention was to exclude only those trusts which were covered by applicable state spendthrift trust laws.[34]

Another argument accepted by some courts is that Congress would not have included the language of section 522(d)(10)(E) exempting ERISA plans to the extent necessary for support of the debtor unless ERISA pension plans were part of the estate.[35] The *Goff* court rejected this argument because the exemption in section 522(d)(10)(E) has a broader application than just to ERISA retirement plans.[36] Under this analysis, corporate plans as opposed to Keogh plans would be excluded.

Several more recent cases have seriously questioned the reasoning of the *Goff* decision. The attack has been both on the court's reasoning in regard to section 522 and the determination that section 541 only applies to state spendthrift trusts.

Two recent circuit court decisions have differed sharply from the reasoning in *Goff*. The Sixth Circuit held in *Forbes v. Lucas* (*In re Lucas*)[37] that ERISA qualified pension plans are not property of the bankruptcy estate but come under the exception in section 541(c)(2) of the Bankruptcy Code.[38] The court found that the language of section 541(c)(2) was clear and unambiguous on its face.[39] Since the statute

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1978 U.S. CODE CONG. & AD. NEWS 5963, 6136).

[32] *Goff*, 706 F.2d at 582.

[33] *Id.* at 582.

[34] *Id.* at 580.

[35] *Lichstrahl*, 750 F.2d at 1491; *Swanson*, 873 F.2d at 1124; *Graham*, 726 F.2d at 1272.

[36] *Goff*, 706 F.2d at 587; *see* Comment, *Contra* Goff: *Of Retirement Trusts and Bankruptcy Code § 541(c)(2)*, 32 UCLA L. REV. 1266, 1277-78 (1985)(explaining and rejecting overlap argument).

[37] 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991). The other decision is Anderson v. Raine (*In re* Moore), 907 F.2d 1476 (4th Cir. 1990). The reasoning of the two decisions is essentially identical, so this comment will refer to the more recent *Lucas* case.

[38] *Lucas*, 924 F.2d at 598.

[39] *Id.* at 601. The court stated that while legislative history can be a legitimate

was not ambiguous, the court did not resort to the legislative history to interpret the statute. The opinion found that the phrase "applicable nonbankruptcy law" clearly meant all state, local, and federal laws.[40] The court cited several sections of the Bankruptcy Code that use the term "applicable nonbankruptcy law" in order to show that a consistent interpretation must include all laws, not just state spendthrift law as *Goff* held.[41] The court found Congress also specifically referred to state law in the Bankruptcy Code when that is what Congress intended.[42] Although the court found that it was not necessary to resort to the legislative history in order to interpret the statute, the opinion did discuss it and found it to be anything but complete and conclusive. The *Lucas* court determined that Congress merely intended explicitly to preserve the exemption of spendthrift trusts available prior to the new Bankruptcy Code rather than to limit the exemption exclusively to these trusts.[43] Interestingly, the *Komet* decision, which so strongly criticized the Fifth Circuit's analysis of section 522, also held that section 541 does not exclude ERISA pensions from the estate.[44]

After the *Lucas* court determined that ERISA was within the ambit of "applicable nonbankruptcy law," the court examined whether the restrictions on assignment and alienation were indeed adequate to provide an exemption. The court held that if the ERISA plan's anti-alienation provisions were effective against the debtor's general creditors, they were effective against the bankruptcy trustee.[45]

One very important point distinguishes *Lucas* and *Moore* from the *Goff* line of cases. The debtors in *Moore* and *Lucas* had pension plans set up by their employers that they could only reach upon retirement, disability, or termination of employment.[46] The debtor in *Goff* had a self-settled pension plan where the settlor-beneficiary could theoreti-

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guide, the language of the statute ordinarily is conclusive. *Id.* (citing Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 808 (1989); Burlington N. R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987)).

[40] *Lucas*, 924 F.2d at 601.

[41] *Id.* The court gave the examples of 11 U.S.C. section 1125(d), where the phrase included securities laws, and 11 U.S.C. section 108(a), which included the Racketeer Influence and Corrupt Organizations Act (RICO). *Id.* at 601 n.7.

[42] *Lucas*, 924 F.2d at 601 n.8.

[43] *Id.* at 602.

[44] *Komet*, 104 Bankr. at 816 n.32. The *Komet* court arrived at this conclusion by finding that Congress would not have included section 522(d)(10)(E), which provides an exemption for ERISA plans under the "generic" federal exemption scheme, if ERISA plans were not property of the estate. *Id.*

[45] *Lucas*, 924 F.2d at 603.

[46] *Moore*, 907 F.2d at 1477.

cally protect the funds from creditors and have access to them himself at the same time.[47] If the interpretation of the Code by the *Moore* and *Lucas* courts is correct, then it should be of no consequence that the trust is self-settled because the statute on its face makes no such distinction.[48] This distinction is certainly important if the crux of the issue is a determination of whether the trust is a spendthrift trust, but under the statutory language currently it should not matter.

The *Goff* decision has opened up a Pandora's box in determining if a debtor's pension plan will be excluded from the estate.[49] Many opinions indicate a desire for uniformity and a fear that plan trustees would have to litigate the plan's qualified status every time a member filed bankruptcy.[50] Instead, the trustee is now forced to litigate the plan's compliance with the various state's spendthrift trust requirements. The *Goff* opinion implied that "employer-created-and-controlled" plans will be protected by state spendthrift laws.[51] The Ninth Circuit's *In re Kincaid* decision expanded the definition of spendthrift trust to include virtually all plans that are not self-settled.[52] However, the decisions on the issue of spendthrift status are almost as diverse as the number of opinions.

There is a fundamental disagreement among the courts as to whether the pension plan must be an actual spendthrift trust in the traditional sense or only possess the characteristics of a spendthrift trust. The majority of courts only require that the plan have the requisite characteristics.[53] The courts generally first decide if the trust is self-settled. Second, the courts will look to the amount of control the debtor had over the trust.

The general rule is that a person may not set up a trust for his or her own benefit and insert spendthrift language in an attempt to pre-

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[47] *Id.* at 1478.

[48] The Fourth Circuit has stated explicitly that the court need not "determine whether the trust is controlled by the settlor or the beneficiary, or whether they are the same person." Shumate v. Patterson, 943 F.2d 362, 364 (4th Cir. 1991). The "generic" federal exemption contained in 11 U.S.C. § 522(d)(10)(E) does not make any distinction as to whether the trust is self-settled or not.

[49] Some courts have gone so far as to hold that ERISA plans are simply not excludable at all because they are not traditional spendthrift trusts. *See In re* Nadler, 122 Bankr. 162, 165 (Bankr. D. Mass. 1990).

[50] *In re* Komet, 104 Bankr. 799, 804-05 (Bankr. W.D. Tex. 1989).

[51] *Goff*, 706 F.2d at 589.

[52] *Kincaid*, 917 F.2d at 1268.

[53] Morter v. Farm Credit Servs., 937 F.2d 354, 357 (7th Cir. 1991)(collecting cases taking both views).

vent creditors from reaching the trust's principal.[54] Physicians and other professionals who have set up plans through professional corporations have uniformly failed to exclude their plans from the estate.[55] The courts have not hesitated to pierce the corporate veil in this situation to hold that the settlor of the trust (ostensibly the corporation) and the beneficiary are one and the same, thus rendering the trust self-settled. Therefore, under the *Goff* approach self-employed individuals will not be able to exclude or exempt their Keogh plans.

A closer question arises in the context of employer created plans where the debtor voluntarily makes contributions to the plan through payroll deductions or other means. *In re Idalski*[56] lists many cases that have held that employee contributions to the plan make the trust self-settled and includable in the estate, contrary to the implication in the *Goff* opinion.[57] The Ninth Circuit's *In re Kincaid* decision rejected this line of reasoning by finding that the employee never had a right to the money which was deducted from the paycheck and deposited in the pension plan.[58] The Fifth Circuit appears to have accepted this line of reasoning in *In re Johnson*.[59] The case involved a voluntary plan where all of the contributions were made by the employee via payroll deductions.[60] The court found that the employee contributions made the plan self-settled.

The second factor courts look to is the amount of control the debtor had over the trust. As mentioned above, Keogh plans will not survive this scrutiny because debtors who are lower level employees will generally not have any control over the pension trust. Several cases

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[54] *Goff*, 706 F.2d at 587. *See generally* 2A A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 156 (4th ed. 1987).

[55] *See In re* Brooks, 844 F.2d 258 (5th Cir. 1988); *In re* Bloom, 839 F.2d 1376 (9th Cir. 1988); *In re* Lichstrahl, 750 F.2d 1488 (11th Cir. 1985); *In re* Goff, 706 F.2d 574 (5th Cir. 1983); *In re* West, 81 Bankr. 22 (9th Cir. BAP 1987); *In re* Kazi, 125 Bankr. 981 (Bankr. S.D. Ill. 1991); *In re* Velis, 123 Bankr. 497 (D.N.J. 1991); *In re* Block, 121 Bankr. 810 (Bankr. C.D. Ill. 1990); *In re* Ullman, 116 Bankr. 228 (Bankr. D. Mont 1990); *In re* Burns, 108 Bankr. 308 (W.D. Okla. 1989); *In re* Alagna, 107 Bankr. 301 (D. Colo. 1989); *In re* Gaines, 106 Bankr. 1008 (W.D. Mo. 1989); *In re* Gifford, 93 Bankr. 636 (Bankr. N.D. Ind 1989); *In re* Boon, 90 Bankr. 988 (Bankr. W.D. Mo. 1987). *But see In re* Wyles, 123 Bankr. 733 (E.D. Va. 1991)(plan not part of estate but court ordered no distributions to debtor until age 59 ½); *In re* Majul, 119 Bankr. 118 (W.D. Tex. 1990)(ERISA preempts state spendthrift laws so physicians' plan excluded).

[56] 123 Bankr. 222 (Bankr. E.D. Mich. 1991).

[57] *Idalski*, 123 Bankr. at 233 (collecting cases).

[58] *Kincaid*, 917 F.2d at 1167.

[59] 724 F.2d 1138 (5th Cir. 1984).

[60] *Johnson*, 724 F.2d at 1140. The court stated, "[m]ore importantly, in *Goff*, as in this case, the 'settlor' made all the contributions to the 'trust' res." *Id.*

have concluded that large minority shareholders, corporate officers, and directors have enough control for the plan to lose its spendthrift status.[61] Following this logic, a court may be forced to reach conflicting holdings regarding the same plan depending on the debtor's position with the employer.

The last factor courts consider is the ability of the debtor to access the plan through hardship disbursements, loans, or payments on termination of employment. *Kincaid* found that the debtor's ability to get the funds through a loan which required repayment with interest[62] or upon quitting his or her job did not destroy the spendthrift status.[63] Other courts have held that if the debtor can get access to the trust by terminating employment, the trust is not a spendthrift trust.[64]

Several states have tried to eliminate this confusion by passing laws which declare that all ERISA qualified plans are presumed to be spendthrift trusts under state law.[65] At least one Illinois court has found such a statute to be unconstitutional.[66]

B. Section 522 Exemption

Section 522(b)(2)(A) of the Bankruptcy Code provides an exemption for certain property that is property of the estate under section 541.[67] The legislative history of section 522 gives an illustrative list of

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[61] *In re* Toner, 105 Bankr. 978 (Bankr. D. Colo. 1989); *In re* Kaplan, 97 Bankr. 572 (9th Cir. BAP 1989); *In re* Shuman 78 Bankr. 254 (9th Cir. BAP 1978)(sole shareholder and president).

[62] *Kincaid*, 917 F.2d at 1168. *Accord In re* James, 126 Bankr. 360 (Bankr. D. Kan. 1991). *Contra In re* Schmitt, 113 Bankr. 1007 (Bankr. W.D. Mo. 1990); *In re* Alagna, 107 Bankr. 301 (Bankr. D. Colo. 1989).

[63] *Kincaid*, 917 F.2d at 1168.

[64] *In re* Rosenquist, 122 Bankr. 775 (Bankr. M.D. Fla. 1990); *In re* Tomer, 117 Bankr. 391 (Bankr. S.D. Ill. 1990); *In re* Schmitt, 113 Bankr. 1007 (Bankr. W.D. Mo. 1990); *In re* Sildorff, 96 Bankr. 859 (Bankr. C.D. Ill. 1989).

[65] *See, e.g.*, ALASKA STAT. § 09.38.017 (Michie Supp. 1991); ARK. STAT. ANN. § 28-69-501 (Supp. 1991); GA. CODE ANN. § 53-12-28 (Michie Supp. 1991); ILL. ANN. STAT. ch. 110 para. 12-1006 (Smith-Hurd Supp. 1991); KAN. STAT. ANN. § 60-2308 (Supp. 1990); OR. REV. STAT. § 23.170 (Butterworth Supp. 1990); WASH. REV. CODE ANN. §6.15.020 (West Supp. 1990).

[66] *In re* Kazi, 125 Bankr. 981 (S.D. Ill. 1991). *Contra In re* Block, 121 Bankr. 810 (C.D. Ill. 1990) (statute creating conclusive presumption that ERISA plan is spendthrift trust not unconstitutional).

[67] Section 522 covers exemptions for property that is already in the estate. If the debtor chooses the state exemptions, then the debtor can still avail himself of other federal nonbankruptcy laws which prevent alienation. Thus, sections 541 and 522 serve two distinct purposes. One, they limit the property in the estate and, two, they prevent certain property of the estate from being within the reach of creditors. *Komet*, 104 Bankr.

acts included in the "other federal law" exemption.[68] In *Goff*, the court placed an unusual amount of emphasis on what it concluded was an illustrative list.[69] The court felt that the absence of ERISA from the list was highly probative of the Congressional intent as to whether a plan was exempt.[70] The court reasoned that Congress intentionally left out ERISA because it was very unlikely that Congress would "overlook" such a sweeping and comprehensive statutory scheme as ERISA.[71] A second apparently significant rationale put forth by the court was that the laws listed in the legislative history are all publicly created or funded, whereas ERISA regulates private pension plans.[72] Thus, a valid governmental interest exists in seeing that the intended beneficiary receives the funds. The court, therefore, concluded that ERISA pension plans were not exempt from the bankruptcy estate

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at 810-11.

[68] The House Reports reads:

Some of the items that may be exempted under other Federal laws include:

-Foreign Service Retirement and Disability payments, 22 U.S.C. § 1104;

-Social security payments, 42 U.S.C. § 407;

-Injury or death compensation payments from war risk hazards, 42 U.S.C. § 1717;

-Wages of fishermen, seamen, and apprentices, 46 U.S.C. § 601;

-Civil service retirement benefits, 5 U.S.C. §§ 729, 2265;

-Longshoremen's and Harbor Worker's Compensation Act death and disability benefits, 33 U.S.C. § 916;

-Railroad Retirement Act annuities and pensions, 45 U.S.C. § 228(L);

-Veterans benefits, 45 U.S.C. § 352(E);

-Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. § 3101; and

-Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. § 175.

H.R. Rep. No. 598, 95th Cong. 1st Sess. 360, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6316; S. Rep. No. 989, 95th Cong. 2nd Sess. 75, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5861.

[69] *Goff*, 706 F.2d at 583.

[70] *Id.* at 585. The court stated that Congress did not overlook ERISA and that the absence of ERISA from this illustrative list showed by Congress' silence a Congressional intention to exclude ERISA. *Id.*

[71] *Id.* One commentator has raised serious doubts about Congress' attention in drafting the illustrative list relied on in *Goff*. *See* Note, *ERISA Bankruptcy Exemptions*, 83 MICH. L. REV. 214, 223 (1984). Two of the statutes listed do not correspond to the title given in the list. For example, 45 U.S.C. section 352(e) is railroad unemployment insurance, not veterans benefits. *Id.* In addition, the Civil Service Retirement Benefits Act and Foreign Service Retirement Benefits statutes were both repealed prior to the House Report in 1966 and 1974 respectively. *Id.*

[72] *Goff*, 706 F.2d at 586.

under section 522(b).[73]

The United States Supreme Court in *Guidry v. Sheet Metal Workers National Pension Fund*[74] took a somewhat different view of ERISA's relationship to the statutes in the legislative history. The opinion found ERISA's anti-alienation provisions "consonant with" several of the statutes in the list relied upon in *Goff*.[75] Although *Guidry* was not a bankruptcy case, this language certainly supports the critics of *Goff*.

In re Komet,[76] a 1989 bankruptcy court case that thoroughly analyzes the *Goff* decision, involved a pension plan that did not qualify as a spendthrift trust under state laws because it was self-settled. The debtor allowed that the pension funds were a part of the bankruptcy estate but claimed that the pension plans were exempt under the Texas statutory exemption[77] and under section 522(b)(2)(A), which provides for exemptions under other federal law.[78] The court found the Texas exemptions preempted by ERISA, but the *Komet* court held that the *Goff* opinion had incorrectly analyzed section 522(b)(2)(A) of the Bankruptcy Code.[79]

The *Goff* court had reasoned that since the purpose of the restrictions on ERISA plans was simply to qualify the plan for favorable tax treatment, they did not rise to the level of the "other federal laws" referred to in section 522(b)(2)(A).[80] The *Komet* court recognized that

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[73] *Id.*

[74] 493 U.S. 365 (1990).

[75] *Guidry*, 493 U.S. at 372 n.13. The statutes in *Guidry* include the Social Security Act, the Railroad Retirement Act, the Civil Service Retirement Act, and the Veterans Benefits Act. *Id.*

[76] 104 Bankr. 799 (Bankr. W.D. Tex. 1989).

[77] *Komet*, 104 Bankr. at 800. The text of the Texas exemption statute is:

> (a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, and under any annuity or similar contract purchased with assets distributed from that type of plan, and under any retirement annuity or contract described by Section 403(b) of the Internal Revenue Code of 1986, and under any individual retirement account . . . is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan . . . does not qualify under the applicable provisions of the Internal Revenue Code of 1986.

TEX. PROP. CODE § 42.0021(a) (Vernon Supp. 1991).

[78] *Komet*, 104 Bankr. at 808.

[79] *Id.*

[80] *Id.* The *Goff* court stated that the anti-alienation requirement:

> is not an exemption from creditors' process provided by federal law . . . .

the failure of a plan to include the required provisions was grounds for civil and criminal action. The court noted also that the prohibition against garnishment originated not with the provisions contained in the plan but from the statute itself.[81] The court continued by citing *Mackey v. Lanier Collection Services*[82] which, like *Guidry*, characterized ERISA section 206(d) as, functionally, a federal exemption consistent with the goal of giving the debtor a fresh start.[83]

Another area of the *Goff* opinion that was troubling to the *Komet* court was the joint analysis of sections 522 and 541.[84] According to *Komet*, the two sections serve entirely different functions. Section 541 was given the broadest possible scope and reach not because Congress simply wanted every item of property in the estate but rather because Congress principally intended to promote uniformity and judicial economy through the ability to adjudicate completely a matter in one forum.[85] However, the broad sweep of section 541 should not be used to imply that the exemptions provided under section 522 are somehow limited by a desire to include the largest amount of property possible. Thus, the *Komet* decision rejects *Goff*'s reasoning that section 522 does not include ERISA plans when it uses the phrase "other federal law."[86]

> ERISA's anti-assignment and alienation provisions are different in kind from those contained in the statutes listed in the Code's legislative history . . . ERISA merely provides that as a condition of obtaining qualified status - with its attendant tax and other benefits - a pension plan must preclude alienation or assignment of its benefits. It does not prohibit pension funds from permitting alienation or assignment; rather, while it encourages and favors qualified plans, it envisions that "disqualified " plans may be formed which are still subject to ERISA's regulatory scheme but which do not restrict alienation or assignment.

Komet, 104 Bankr. at 808-09 (quoting *Goff*, 706 F.2d at 583).

[81] *Id.* at 807. The court cites General Motors v. Buha, 623 F.2d 455, 461-63 (6th Cir. 1980), among numerous cases, to support the proposition that ERISA section 206(d) overrides state collection laws outside of bankruptcy.

[82] 486 U.S. 825 (1988).

[83] *Komet*, 104 Bankr. at 807.

[84] *Id.* at 810.

[85] *Id.*

[86] Several cases have followed the *Komet* decision. *See In re* Suarez, 127 Bankr. 73 (Bankr. S.D. Fla. 1991) (ERISA plans exempt under section 522(b)(2)(A)); *In re* Smith, 119 Bankr. 262 (Bankr. E.D. Okla. 1990) (same); *In re* Majul, 119 Bankr. 118 (Bankr. W.D. Tex 1990) (same); *In re* Starkey, 116 Bankr. 259 (Bankr. D. Colo. 1990) (same); *In re* Burns, 108 Bankr. 308 (Bankr. W.D. Okla. 1989) (same). *Contra In re* Spears, 121 Bankr. 896 (Bankr. M.D. Fla. 1990) (ERISA plan not exempt); *In re* McIntosh, 116 Bankr. 277 (Bankr. N.D. Okla. 1990) (same); *In re* Martin, 115 Bankr. 311 (Bankr. D. Utah 1990) (same); *In re* Conroy, 110 Bankr. 492 (D. Mont. 1990) (same); *In re* Alagna, 107 Bankr. 301 (Bankr. D. Colo. 1989) (same).

So far this comment has examined the interpretation of two interrelated bankruptcy issues. First, is the ERISA plan exempt under section 522, as *Komet* determined? Second, is the plan excluded from the estate altogether, as in *Moore* and *Lucas*? The focus now turns to the situation in those circuits that follow the *Goff* decision. Are state law bankruptcy exemptions that apply to ERISA plans preempted by ERISA?

V. Supreme Court Decisions Affecting ERISA Preemption

In *Alessi v. Raybestos-Manhattan, Inc.*,[87] the Supreme Court found that ERISA preempted a New Jersey statute that prevented pension plans from reducing retirement benefits by an amount equal to a workers' compensation claim received by the retiree.[88] The circuit court had found that a state statute that "relates to" ERISA in the normal dictionary sense of the word would be preempted.[89] The Supreme Court found the statute to be preempted, but Justice Marshall stated that the reasoning was because the New Jersey statute prohibited that which ERISA allowed.[90] The Court did not address the issue of how far ERISA preemption might go because the Court found the New Jersey statute conflicted directly with the federal law and was therefore not permissible.[91]

In *Shaw v. Delta Airlines*,[92] the Court addressed a state law that did not conflict directly with the contents of ERISA. The New York statute in question required employers to provide pregnant women the same disability benefits which a worker would receive for any nonoccupational disability.[93] The Court looked to the legislative history and the Congressional intent because this law did not conflict with ERISA as did the law in *Alessi*. The Court in this decision seemed to embrace the dictionary definition of "relate to," contrary to the *Alessi* opinion. The opinion found that the legislative history implied a broad expan-

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[87] 451 U.S. 504 (1981).

[88] New Jersey attempted to prevent integration of the retirement plan and workers compensation by restricting the set off of workers compensation claims against retirement benefits. N.J. Stat. Ann. § 34:15.29 (West 1988).

[89] *Alessi*, 451 U.S. at 524.

[90] *Id.* ERISA would allow the integration of the pension fund benefits with other sources of income the retiree might have while the New Jersey statute prohibited this integration. *Id.*

[91] *Id.* at 525.

[92] 463 U.S. 85 (1983).

[93] *Shaw*, 463 U.S. at 90. This law obviously affects a welfare pension plan as distinguished from a retirement benefit plan.

sive interpretation of section 514(a) of ERISA.[94] The Court quoted Representative Dent, a co-sponsor of the bill, who said, "[T]he crowning achievement of this legislation [is] the reservation to Federal authority the sole power to regulate the field of employee benefit plans."[95] Thus, the Court decided that the New York statute related to an employee benefit plan and was preempted.[96]

The Court further expanded the reading of "relate to" in *Pilot Life Insurance Co. v. Dedeaux*.[97] The beneficiary of a plan brought several common law tort actions against an insurance carrier that administered an employee benefit plan. Justice O'Connor once again stated that "relate to" has the common sense meaning normally attached to it. She also noted that the Congressional intent was the "ultimate touchstone" of statutory construction.[98] The *Dedeaux* decision also seems to reject a position that state laws that relate do not necessarily regulate aspects of the plan.[99]

Fort Halifax Co. v. Coyne[100] was the next important case in which the Supreme Court developed the boundaries of ERISA preemption. In this case, the Supreme Court found that a Maine law requiring a company to pay the former employees at a closed plant a lump sum payment as severance pay was not preempted by the ERISA statutes. The Court concluded that there was a distinction between a state law which relates to an employee benefit plan and one that simply relates to employee benefits. The Court noted that the language of section 514(a) refers specifically to employee benefits plans and, as the words "benefit" and "plan" were used as distinctly different terms in ERISA, the choice of the word "plan" must be given significance. The Court found that Congress was concerned only with preempting state laws that might infringe upon the area of the administrative operation of a benefit plan and not with a law which deals specifically with the disposition of the benefits. The Court stated this explicitly in the following:

> Congress intended preemption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature re-

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[94] *Id.* at 99-100.
[95] *Id.* (citing 120 CONG. REC. 29,197 (1974)).
[96] *Id.* at 108.
[97] 481 U.S. 41 (1987).
[98] *Dedeaux*, 481 U.S. at 45.
[99] *Id.* at 47-57.
[100] 482 U.S. 1 (1987).

> quires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress preempted state laws relating to *plans*, rather than simply to *benefits*.[101]

The Court went on to say that simply making a single payment does not create the type of intrusion upon benefit plans for which Congress was worried about when they preempted state laws. Citing the paragraph above from *Fort Halifax*, the Fifth Circuit in *Wells v. General Motors Corp.*[102] found a severance pay scheme was not preempted by ERISA. The court concluded that since the payment plan was not a continuing plan and did not require any type of administrative procedure, the payment did not qualify as a "plan" under ERISA.[103] *Wells* also cites an earlier Fifth Circuit opinion which stated that "preemption does not occur where state law claims are 'only peripherally connected at the concerns addressed by ERISA.' "[104]

The most influential decision from the Supreme Court dealing with ERISA preemption of state law is *Mackey v. Lanier Collection Agency & Services, Inc.*[105] In the first part of the decision, the Court found that a Georgia law that attempts to preclude garnishment of welfare pension benefits is preempted by the ERISA statutes.[106] The Supreme Court used a definition of "relates to" found in *Shaw* where the Court said, "[A] law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."[107] The *Mackey* Court went on to state, "[W]e have virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are preempted under section 514(a)."[108] "[W]e also conclude that any state law which singles out ERISA plans, by express reference, for special treatment is preempted. . . . It is this 'singling out' that preempts the Georgia anti-garnishment exception."[109] Neither of these excerpts apply in the present case. The statutes discussed later do not specifically affect beneficial plans nor do they "single out" ERISA plans for special treatment. Instead, the statutes include the benefits of an ERISA plan in a com-

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[101] *Fort Halifax*, 482 U.S. at 11 (emphasis in the original).
[102] 881 F.2d 166 (5th Cir. 1989).
[103] *Wells*, 881 F.2d at 166.
[104] *Id.* at 175 n.22.
[105] 486 U.S. 825 (1988).
[106] *Mackey*, 486 U.S. at 827-30.
[107] Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983).
[108] *Mackey*, 486 U.S. at 829.
[109] *Id.* at 838 n.12.

prehensive exemption scheme for debtors seeking bankruptcy protection. Justice White's opinion in *Mackey* purports to use the mere mention or reference to ERISA as a litmus test for the Court easily to dispose of state laws which "intrude" into the area of ERISA control. However, the second portion of the opinion which deals with the general Georgia garnishment procedure in which the procedure was not preempted by ERISA belies the true reasoning behind the Court's decision.

In finding that the general garnishment procedures are not preempted, the Supreme Court used the more traditional means of interpreting statutes by looking at Congressional intent. The Court found, "Congress did not intend to forbid the use of state law mechanisms of executing judgments against ERISA welfare benefit plans."[110] The Court refers to 29 U.S.C. section 1132, which allows ERISA benefit plans to "sue and be sued" under what the Court terms "run of the mill state law claims."[111] The Court then extrapolated this relationship in which the state law claims are not exempted to the general proposition that the Georgia garnishment procedure is not preempted either. Although the Court held that the consistency of a state statute with ERISA policy will not save it from preemption, the reasoning behind the opinion seems to indicate otherwise. The Supreme Court noted that the Georgia garnishment exemption "prohibits that which the federal statute permits."[112] The general garnishment procedure, on the other hand, was found to be consistent with the aims of the ERISA statute.[113]

Mackey also deals specifically with *welfare benefit plans* as opposed to *pension benefit plans* which are the subject of most state bankruptcy exemptions. The Tenth Circuit Court of Appeals found this to be an important distinction when considering preemption.[114]

Thus, while *Mackey's* language is expansive it should be ap-

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[110] *Id.* at 831.

[111] *Id.* at 832-33.

[112] *Id.* at 828.

[113] *Id.* at 834.

[114] Guidry v. Sheet Metal Workers Nat'l Pension Fund, 856 F.2d 1457, 1460 n.4 (10th Cir. 1988), *rev'd*, 493 U.S. 365 (1990). The court stated:

> We are aware of the recent decision in [*Mackey*] . . . . The Court's discussion, however, focused on its holding that Congress did not intend to preempt State-law garnishment procedures of an ERISA *welfare benefit plan* (emphasis added). It neither discussed in depth nor cited support for its statement regarding pension benefit plans. We therefore do not believe this decision is dispositive of the issues in the instant case.

856 F.2d at 1460 n.4.

proached with caution when, as in this case, the ERISA plan dealt with what may be of a fundamentally different nature.

VI. ERISA Preemption in Bankruptcy Cases

A. Komet and Volpe Decisions

The determination whether state exemptions are preempted by ERISA has been the subject of much controversy and many conflicting opinions.[115] In the circuits that follow *Goff*,[116] the debtor's pension plan is considered part of the estate. Thus, the question of state law exemptions comes to the forefront. The Fifth Circuit, which took the lead with the *Goff* opinion, has once again taken the lead in the discussion of ERISA preemption. The Fifth Circuit was the first court of appeals to decide the preemption issue directly in two October 15, 1991, opinions: *In re Dyke*[117] and *In re Volpe*.[118] The Ninth Circuit followed quickly with *Pitrat v. Garlikov*,[119] an opinion handed down October 25, 1991. Unfortunately for debtors and creditors alike, the circuits once again did not agree.

The *Volpe* case provides an excellent insight into the complexities of this issue. The bankruptcy court,[120] district court,[121] and the Fifth Circuit each found that ERISA does not preempt state law exemptions but used different avenues to approach the problem. The bankruptcy court's *Volpe* decision, will be contrasted with the *Komet* decision which was discussed earlier. Both of these cases originated in the Western District of Texas and treat the Texas exemption found in Texas Property Code section 42.0021.[122]

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[115] *See In re* Smith, 119 Bankr. 262 (Bankr. E.D. Okla. 1990) (state exemption preempted); *In re* Majul, 119 Bankr. 118 (Bankr. W.D. Tex. 1990) (same); *In re* Carver, 116 Bankr. 985 (Bankr. S.D. Iowa 1990) (same); *In re* Messing, 114 Bankr. 541 (Bankr. E.D. Tenn.) (same); *In re* Sellers, 107 Bankr. 152 (Bankr. E.D. Tenn. 1989) (same). *Contra In re* Nuttleman, 117 Bankr. 975 (Bankr. D. Neb. 1990) (state exemption not preempted), *aff'd in part, rev'd in part*, 128 Bankr. 254 (Bankr. D. Neb. 1991); *In re* Vickers, 116 Bankr. 149 (Bankr. W.D. Mo. 1990) (same); *In re* Seilkop, 107 Bankr. 776 (Bankr. S.D. Fla. 1989) (same).

[116] 706 F.2d 574 (1983); *see supra* note 21.

[117] 943 F.2d 1435 (5th Cir. 1991).

[118] 943 F.2d 1451 (5th Cir. 1991).

[119] 1991 Westlaw No. 213896 (October 25, 1991).

[120] 100 Bankr. 840 (Bankr. W.D. Tex. 1989), *aff'd*, 120 Bankr. 843 (W.D. Tex. 1990), *aff'd*, 943 F.2d 1451 (5th Cir. 1991).

[121] 120 Bankr. 843 (W.D. Tex. 1990), *aff'd*, 943 F.2d 1451 (5th Cir. 1991).

[122] *See supra* note 77 for text of the statute.

Komet[123] was discussed in relation to the question of whether section 522 of the Bankruptcy Code provided an exemption.[124] Judge Leif Clark analyzed the preemption issue even though he found an exemption under section 522, as discussed earlier. The preemption language for the ERISA statutory scheme is found in section 514 of ERISA.[125] The *Komet* court found that the expansive reading of section 514(a) in the *Mackey* decision made it almost impossible for statutes like the Texas exemption statute to escape preemption.[126] The court also cited *In re Dyke*[127] in concluding that preemption was not affected by the fact the statute in question did not conflict with ERISA.[128] Of course, the Texas statute does not make any direct reference to the ERISA statute but instead makes the exemption contingent upon certain sections of the Internal Revenue Code of 1986. The code sections cited are the provisions which provide tax benefits for qualified ERISA plans. Thus, for these sections to be applicable they would have to be ERISA qualified plans. The *Komet* decision made it clear that the states cannot avoid preemption by referring to the Internal Revenue Code in lieu of ERISA where the effect of the statute is the same.[129]

Komet also suggested that section 42.0021 may inadvertently conflict with ERISA. The Texas statute exempts pensions from attachment, levy, or seizure from any debt while ERISA permits the attachment of funds for domestic support orders.[130] Further, the court held

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[123] 104 Bankr. 799 (Bankr. W.D. Tex. 1989).

[124] *See supra* notes 76-86 and accompanying text.

[125] 29 U.S.C. § 1144 (1988). Section 1144 provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .
>
> (c) For the purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, and other State action having the effect of law, of any State . . . .
>
> (2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to *regulate*, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.
>
> (d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . .

29 U.S.C. § 1144 (1988) (emphasis added).

[126] *Komet*, 104 Bankr. at 799, 801 (Bankr. W.D. Tex. 1989).

[127] 99 Bankr. 343 (Bankr. S.D. Tex. 1989).

[128] *Komet*, 104 Bankr. at 801.

[129] *Id.* at 801 n.3.

[130] *Id.* at 804.

that reliance on ERISA to determine what benefits are exempt would force the state courts to determine if a plan was qualified. This is an area that Congress has left for the Secretary of the Treasury to decide.[131] Since a plan trustee will, of necessity, have to be involved in any determination that the plan is qualified, then the statute will be preempted[132] even under the narrower standard of preemption in *Fort Halifax*.[133]

Judge Kelly's opinion in *In re Volpe*[134] gives an excellent analysis of the complex legal situation present in the instant case. The facts in this case are very similar to the *Komet* case. Volpe, a physician, had a large sum of money in a retirement and profit sharing plan set up by the practice group of which he was a member.[135] Judge Kelly found that a state law is not preempted unless it conflicts with a valid federal law.[136] However, this conflict could include the preemption of an entire area of regulation by Congress. He went on to find that the statute in the *Mackey* decision was preempted because it conflicted with the Congressional silence as to the ability to garnish welfare benefit plans. The *Volpe* court also found a difference in the term "makes" reference to and "have" reference to, holding that the second phrase indicated a preempted statute but the first was simply a semantical reference to ERISA and not preempted.[137] In his discussion of the *Mackey* case, Judge Kelly noted and found it significant that the Supreme Court apparently approved of Judge Tang's dissent in *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*.[138]

Judge Tang's dissent couples section 514(a) and (c)[139] such that

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[131] *Id.*

[132] *Komet*, 104 Bankr. at 805.

[133] *See supra* notes 100-103 and accompanying text.

[134] 100 Bankr. 840 (Bankr. W.D. Tex. 1989).

[135] The debtor had almost $500,000 in his various accounts. *Volpe*, 100 Bankr. at 841.

[136] *Id.* at 847-48. The court relied on the Supremacy Clause of the Constitution to support the idea that only conflicting law is preempted. *Id.* at 848. The Supremacy Clause reads, "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land, any Thing in the Constitution or Laws of any State to the *Contrary* notwithstanding." (emphasis added). U.S. CONST. art. VI § 2, cl. 1.

[137] *Volpe*, 100 Bankr. at 854-55. The court followed the reasoning that the statute affects the plan in too tenuous, remote or peripheral a manner and is thus not within the realm of ERISA's preemption. *Id.*

[138] 679 F.2d 1307 (9th Cir. 1982), *vacated*, 463 U.S. 1 (1983).

[139] 29 U.S.C. § 1144 (1988).

the definition of "State" in section 514(c), where Congress uses the term "regulate," limits the expansive reach of the "relate to" language contained in 514(a). Judge Tang suggested that "[t]he legislative choice of the word 'regulate' in section 514's definition suggests that the section was not designed to preempt state laws having only a tangential, non-regulatory effect on benefit plans."[140] A later Ninth Circuit case also followed the same two-prong test in deciding whether a statute is preempted by ERISA.[141] Here the court found that "[t]he statute as applied in this case is preempted if it both 'relate[s]' to an ERISA plan and 'purport[s] to regulate, directly or indirectly' employee benefit plans."[142] Since the court of appeals found that the statute in question was preempted, it is difficult to judge whether the Supreme Court's approval extended to the two-prong test utilized by the Ninth Circuit. This two-prong test was noted by the Fifth Circuit in *Iron Worker's Mid-South Pension Fund v. Terotechnology Corp.*[143] The Court, however, found that they did not need to decide whether the two-prong test had to be met in order for the state law to be preempted because the law in question would have been preempted under either test. *Iron Workers* cites the *Martori Brothers* case in an effort to give some examples for the types of laws which have been preempted by the ERISA statutes. The court quotes as follows:

> The state laws that have previously been found to be preempted by section 514(a) because they 'relate' to ERISA plans fall into four categories. First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of the benefits to be paid under ERISA plans. Fourth, laws and common law rules that provide remedies for misconduct growing out of the administration of the ERISA plan. The principle underlying all these decisions would appear to be that the state law is preempted by section 514(a) if the conduct sought to be regulated by the state law is 'part of the administration of an employee benefit plan': that is, the state law is

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[140] *Franchise Tax Board*, 679 F.2d at 1312.

[141] Local Union #598 v. J. A. Jones Construction Co., 846 F.2d 1213, 1218 (9th Cir. 1988), *aff'd*, 488 U.S. 881 (1989).

[142] *J. A. Jones Construction*, 846 F.2d at 1218. (citing Martori Brothers Distributors v. James-Massengale, 781 F.2d 1349, 1356 (9th Cir.), *amended*, 791 F.2d 799 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986)).

[143] 891 F.2d 548 (5th Cir.), *cert. denied*, 110 S. Ct. 3272 (1990).

> preempted if it regulates the matters regulated by ERISA: disclosure, funding, reporting, vesting, and enforcement of benefit plans.[144]

The laws preempted in the paragraph quoted above seem to indicate the use, whether consciously or not, of the two-pronged test described above. Further support for this two-pronged approach can be found in *Fort Halifax*, discussed earlier, where the Supreme Court held that a Maine state law requiring a lump sum severance payment upon the closing of a plant was not preempted.[145]

The *Fort Halifax* Court along with *Mackey*, *Shaw*, and *Volpe* noted that when deciding whether a federal law preempts a state law, "the purpose of Congress is the ultimate touchstone."[146] The state statutes which exempt pension benefits from creditors are clearly consistent with the intentions of Congress as Congress has already exempted the benefits from the reach of creditors outside of the realm of bankruptcy proceedings and pursuant to the "generic" federal exemptions. Furthermore, the exemption of the pension benefits from the creditors in bankruptcy certainly does not create but rather alleviates any administrative burden on the plans.

B. Volpe District Court Decision

The district court's *In re Volpe* opinion appears tacitly to follow the analysis above. The essential reasoning behind the district court's holding is that the reference to ERISA or the anti-alienation sections of the Internal Revenue Code are simply definitional.[147] The statute does not create any additional burden on the administration of the plan. Thus, the state exemption does not "relate" to a benefit plan but merely defines a subset of the debtors property that the state legislature has exempted from the bankruptcy estate.[148] The court then held the relationship between ERISA and Texas' exemption statute was "merely tangential, and is too tenuous, remote or peripheral to 'relate' " to the benefit plan.[149]

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[144] *Iron Workers*, 891 F.2d at 553.

[145] *Fort Halifax*, 482 U.S. at 23.

[146] *Id.* at 8 (citing Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 747 (1985) (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978))).

[147] *Volpe*, 120 Bankr. at 848.

[148] *Id.*

[149] *Id.*

C. Circuit Court Opinions on Preemption

The Fifth and Ninth Circuits both handed down decisions in October 1991 confronting the preemption issue directly. Both the Fifth and Ninth Circuits start by reaffirming their adherence to *Goff* and *Daniel,* respectively. The Fifth Circuit in *Dyke,*[150] a companion case to *Volpe*, took a decidedly different approach than that of the district court. The Fifth Circuit found that any statute which is not of general application but applies specifically to an ERISA plan is necessarily preempted.[151] The court cited *Mackey*'s distinction between the general garnishment statute and the specific law that was preempted.[152] In the court's words, "[A]bsent an applicable exception, ERISA automatically preempts all state laws which specifically refer to ERISA benefit plans."[153] The Ninth Circuit supported the contention that a state law which specifically mentions ERISA is automatically preempted,[154] but the two decisions diverge from this point.

The Ninth Circuit held that the Arizona exemption statute conflicted with ERISA, a conflict which resulted in the preemption of the state statute.[155] The reasoning behind this conflict appears somewhat contrived. The court first found that the ERISA anti-alienation provisions do not protect the debtor in bankruptcy under the *Daniel* decision. The state exemption, on the other hand, would by operation of the Bankruptcy Code allow the debtor protection in bankruptcy. Therefore, the disposition of the ERISA plan would be different. The court held that this difference in disposition represents a conflict between ERISA and the state exemption. The court even went so far as to opine, "it seems almost axiomatic that when two people argue about preemption" there must be a conflict.[156]

The Fifth Circuit took a more reasoned approach to the issue, holding that ERISA section 514(d) saved the Texas exemption statute from preemption.[157] Both courts looked to the Supreme Court's decision in *Shaw v. Delta Airlines, Inc.*[158] where a portion of New York's Human Rights Law was found to be saved from preemption by section 514(d) because Federal Title VII depends on state law as part of a

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[150] 943 F.2d 1435 (5th Cir. 1991).
[151] *Dyke*, 943 F.2d at 1446-48.
[152] *Id.* at 1448.
[153] *Id.*
[154] *Pitrat*, 1991 Westlaw No. 213896 at 12 n.2 (Sneed, dissenting).
[155] *Id.* at 6.
[156] *Id.*
[157] *Dyke*, 943 F.2d at 1450.
[158] 463 U.S. 85 (1983); *see supra* notes 92-96 and accompanying text.

comprehensive enforcement scheme. The Court held that the preemption of the portions of state law which furthered this federal-state scheme would "impair" and "modify" Title VII contrary to section 514(d). *Dyke* and the dissent in *Pitrat* reasoned that Congress had expressly given the states power to create exemptions and opt out of the federal exemptions as part of an overall scheme to further the goals of the Bankruptcy Code.[159] Preempting a state exemption would damage this plan and modify and impair federal law in violation of section 514(d). Although the court stopped short of embracing the idea of "federalization" of state law, this decision, if it stands, is a large step in that direction.

In the Ninth Circuit's view, the Bankruptcy Code is an autonomous system which can operate fully without regard to state exemptions.[160] Unfortunately, this view simply ignores the fact that thirty-five states have "opted out" of the federal exemptions. If debtors in these states did not have the state created exemptions, then they would have no exemptions at all.

The Fifth Circuit's decision is the better position in this dispute. Even though both courts relied on *Shaw*, none of the Supreme Court cases that deal with preemption of state laws, by ERISA have dealt with the situation from a bankruptcy posture. The *Dyke* opinion recognized that the bankruptcy proceeding involves a unique interplay between the Bankruptcy Code, state laws, and ERISA. By allowing states to "opt out," the federal government has looked to the states for property exemptions because property law is traditionally a realm left to state power and should not be brushed aside unless there is a conflict with federal law.[161] The provision to let the states decide on the property exempt from the creditors in a bankruptcy proceeding is at the very heart of the Bankruptcy Code's goal of allowing a debtor to have a fresh start after leaving the bankruptcy proceedings. Allowing the ERISA provisions to supersede state exemptions would ignore not only the Congressional goals of ERISA but also the Congressional goals in having a uniform Bankruptcy Code.

The Supreme Court has stated on numerous occasions that Congressional intent is the ultimate guide in interpreting a statute. The *Mackey* Court stated, "[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion

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[159] *Dyke*, 943 F.2d at 1449-50; *Pitrat*, 1991 Westlaw No. 213896 at 11.

[160] *Pitrat*, 1991 Westlaw No. 213896 at 9.

[161] *Volpe*, 100 Bankr. at 855 (citing Butner v. United States, 440 U.S. 48, 50 (1979)).

of that same law."[162] Courts which have allowed creditors access to pension benefits in a bankruptcy proceeding have done exactly this. They have rendered section 206(d)(1) of ERISA superfluous by simply sidestepping the anti-alienation provisions of ERISA.[163] These same courts by holding state exemptions preempted have also reached the paradoxical result that assets of the debtor which are not available to the creditor outside of bankruptcy are available in a bankruptcy proceeding. At this juncture many of the cases have involved individual pension plans set up by doctors with substantial amounts of money.[164] However, it is highly probable in the future that more and more cases will involve the typical employee who desperately needs his pension plan for a secure retirement. Although some debtors may attempt to get a "head start" rather than a "fresh start" through the exemption of ERISA qualified plans, the average employee who will eventually face this same question will need to conserve his pension asset simply to make a fresh start and avoid living on the public welfare system after retirement.

Another example of the federal government looking to the state can ironically be found in the *Mackey* decision. In discussing the "sue and be sued clause" which saved the general garnishment procedures used by the State of Georgia, the Court stated:

> Moreover, Federal Rule of Civil Procedure 69(a), which would apply when either type of civil suit discussed above is brought against an ERISA plan in federal court, *defers to state law* to provide methods for collecting judgments . . . . Consequently, state law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA . . . .[165]

The Supreme Court has recognized in these two opinions that federal law does at times look to the states for the regulation of certain areas. This intertwining of federal and state regulations requires that the state laws not be preempted in order for the federal regulations to retain their effectiveness.

Another important distinction in the case at issue here is the involvement of an area of law historically left to the states to regulate: property law. The Fifth Circuit in a case decided in June of 1990 found, "ERISA preemption analysis 'must be guided by respect for the

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[162] *Mackey*, 486 U.S. at 837.
[163] 29 U.S.C. § 1056(d)(1)(1988).
[164] *See supra* note 50.
[165] *Mackey*, 486 U.S. at 834 (emphasis added).

separate spheres of governmental authority preserved in our federal system.' "[166] The Fifth Circuit has found two common denominators that are present in ERISA preemption cases:

> 1) when a state law involves exercise of traditional state authority, courts are less likely to find preemption, and 2) when the state law in question does not deal with relations among the principal ERISA entities — the employer, the plan, the plan fiduciaries and the beneficiaries — but rather with a relation between one of these entities and a third party, the courts are less likely to find preemption.[167]

The statute in question in the Texas cases involved a property exemption, an area which has traditionally been left to the states to regulate. Congress obviously intended this state regulation to continue by allowing the states to opt out of the federal bankruptcy exemption scheme. The second factor noted by the court is also missing in this case. The two parties involved in these cases are clearly the plan's participant and a third party, his creditors. The statute has no bearing on the relationship between the principals listed by the Fifth Circuit.

A situation that is somewhat analogous is the garnishment of pension benefits for the benefit of a spouse and children pursuant to a divorce decree. The Supreme Court in *Shaw* stated that some state laws "may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."[168] The Court cited as an example *American Telephone & Telegraph Co. v. Merry*,[169] a case that allowed the state to garnish an employee's pension benefits for alimony and support payments to his spouse. The courts had little trouble in carving out this exception in spite of a direct conflict with the anti-alienation clauses in the ERISA plan because the overall goals and purpose of ERISA, to make retirement support more secure for employees and their families, were furthered.[170] Obviously, these same goals would be furthered by allowing the debtor to exempt his pension plan from the grasp of creditors in the bankruptcy proceeding. In 1984 Congress, apparently feeling the

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[166] Memorial Hospital System v. Northbrook Life Insurance Co., 904 F.2d 236, 244 (5th Cir. 1990) (citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 19 (1987)).

[167] *Volpe*, 100 Bankr. at 853-54 (citing Sommers' Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1467 (5th Cir. 1986)).

[168] Shaw v. Delta Airlines, Inc., 463 U.S. 85, 108 n.21 (1983).

[169] 592 F.2d 118 (2d Cir. 1979).

[170] Congress recognized the need for this exception in 1985 when it passed the Retirement Equity Act of 1985.

need explicitly to state this exception in ERISA, amended the statutes to provide for the garnishment of pension benefits for support of a spouse pursuant to a divorce decree.

VII. Disqualification of an ERISA Plan

One specter that hangs over the debate on preemption is the possibility that the IRS may disqualify a pension plan where the plan was required to turn over funds to creditors in violation of the restriction on alienation.[171] However, there do not appear to be any instances yet where the IRS has disqualified a plan if the plan contested the demands of the creditors. The chaos that would result from the disqualification of a plan by a major employer such as General Motors should give judges pause to consider the consequences of the burden preemption may have upon the pension plan.

VIII. Mississippi Law

In re McLeod[172] is the only reported Mississippi case discussing the treatment of ERISA plans in bankruptcy. The debtor claimed his ERISA plans were exempt under section 85-3-1 of the Mississippi Code, which provides for the exemption of certain property from the bankruptcy creditors.[173] The statute states in part:

> (1) There shall be exempt from seizure under execution or attachment:
>
> (b)(iii) All property and pension trusts which are qualified under the Employment Retirement Income Security Act of 1974 (ERISA) (P.L. No. 93406), including, but not limited to, self-employment retirement (Keogh) plans and individual retirement accounts (IRA).[174]

This Mississippi statute is very similar to the Texas statute addressed in *Volpe* and *Komet*.[175] Judge Gaines, however, found the Mississippi exemption to be preempted.[176] The parties stipulated that the funds were property of the estate, so *McLeod* does not deal with the section 541 exclusion question.[177] The court cited the dicta in the *Goff* opinion

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[171] Priv. Ltr. Rul. 91-09-051 (Dec. 5, 1990); Priv. Ltr. Rul. 90-11-037 (Dec. 20, 1989).
[172] 102 Bankr. 60 (Bankr. S.D. Miss. 1989).
[173] *McLeod*, 102 Bankr. at 61.
[174] Miss. Code Ann. § 85-3-1 (Supp. 1990) (amended 1991).
[175] *See supra* note 77 for text of Texas statute.
[176] *McLeod*, 102 Bankr. at 65.
[177] *Id.* at 62.

to dispense quickly with the section 522(b) exemption question.[178]

The court here relied on a broad reading of the *Mackey* decision, leaving little room to save a state statute from preemption. The court also looked to *Cefalu v. B.F. Goodrich Co.*,[179] a recent Fifth Circuit case, to determine that the state law was preempted.[180] The *Cefalu* court simply reiterated the Supreme Court decision discussed previously and broadly held that any law that "relates" to ERISA is preempted.[181]

Another factor not mentioned by the court but certainly prevalent in many of these cases is that the state exemption does not limit in any way the amount of money the debtor may exempt.[182] Therefore, it is highly probable that the court wanted to avoid the inequitable result of letting the debtor potentially walk away from bankruptcy with a substantial head start at the creditor's expense.

The debtor also attempted to exempt his IRA's under the same statute.[183] The court determined that language in the statute indicated the legislature's intent to exempt only ERISA plans, even though the statute mentions IRA's which are not governed by ERISA. Thus, the debtor's IRA was not exempt either.[184]

The Mississippi Legislature attempted to address the ERISA preemption issue in the 1991 legislative session by amending the statute which *McLeod* found was preempted. Unfortunately, the results have only added to the confusion and uncertainty which clouds this important issue.

The legislature passed a bill which for the first time allowed Mississippi debtors to choose between the Mississippi exemptions and the generic federal exemptions.[185] Previously the debtor could only use the state exemptions.[186] This would allow a debtor who had a large pension plan to exempt the plan, at least to the extent necessary for support under the federal exemptions[187] without fear of preemption.

The legislature also adopted as the new text of the exemption the

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[178] *Id.* at 63.

[179] 871 F.2d 1290 (5th Cir. 1989) (state law breach of contract action preempted).

[180] *McLeod*, 102 Bankr. at 63.

[181] *Cefalu*, 871 F.2d at 1293-94 (few statutes beyond ERISA preemption).

[182] MISS. CODE ANN. § 85-3-1 (Supp. 1990) (amended 1991).

[183] *McLeod*, 102 Bankr. at 64-65.

[184] *Id.*

[185] 1991 Miss. Laws ch. 479, § 7 (1991).

[186] MISS. CODE ANN. § 85-3-1(2) (Supp. 1990) (amended 1991).

[187] 11 U.S.C. § 522(d)(10)(E)(iii) (1988).

exact language of the federal exemption.[188] Thus, the debtor would not be able to get a head start at the expense of his creditors. The use of the federal language also makes it somewhat incongruous to preempt the state exemption when the same result could be achieved by choosing the federal exemption. The problem with this new approach arose about one month after the bill was passed. The legislature adopted a second bill which adds section 85-3-2 to the Code.[189] This section once again makes Mississippi a mandatory opt out state, forcing the debtor to rely solely on the state exemptions.[190] Both of these laws became effective July 1, 1991.[191] Since the first bill did not affirmatively give the right to choose the federal exemption but merely removed the prohibition on that choice, section 85-3-2 will presumably control.

IX. Preemption of Individual Retirement Accounts Exemption

Another issue that arises in many of these cases is that the statutes also exempt IRA's. Specifically in Mississippi, the language of former section 85-3-1[192] of the Mississippi Code gives an exemption for ERISA qualified plans including, but not limited to, Keogh and IRA plans.

In order to determine if a plan falls under ERISA, one must look to section 1003, which provides that ERISA:

> Shall apply to any employee benefit if it is established or maintained — 1) by an employer engaged in commerce or in any industry or activity effecting commerce; or 2) by any employee, organization or organizations representing employees engaged in commerce or in any industry or activity effecting commerce; or 3) by both.[193]

In fact, ERISA specifically excludes IRA's from coverage.[194] *In re Martin*[195] gives a rather thorough discussion of the reasons IRA's are not included under the ERISA statutes. This case also lists numerous other cases that have reached the same conclusion. A Fifth Circuit bankruptcy case reaching the same conclusion found that "individual

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[188] *See supra* note 17 for the exact language.

[189] 1991 Miss. Laws ch. 614 § 1 (1991).

[190] *Id.*

[191] *See* 1991 Miss. Laws ch. 479, § 8, ch. 614, § 2.

[192] *See supra* note 174 and accompanying text.

[193] 29 U.S.C. § 1003(a) (1988).

[194] 29 U.S.C. § 1051(6) (1988); *see also In re* Ewell, 104 Bankr. 458 (Bankr. M.D. Fla. 1989).

[195] 102 Bankr. 639 (Bankr. E.D. Tenn. 1989).

retirement accounts and other devices which enjoy favorable tax treatment . . . are not governed by ERISA. If these devices are not governed by ERISA, they are also not subject to the preemption scheme of section 514(a)."[196]

The IRA's present an easy question for the court. ERISA specifically states these plans are not covered by ERISA. Therefore, independent of any holding regarding the debtor's qualified pension plans, state exemptions for IRA's must not fall to preemption by ERISA, which has no connection with IRA's.

X. Conclusion

The current state of doubt with regard to the correct treatment of ERISA qualified plans is not and should not be acceptable to debtors or creditors. The dual questions of exclusion under 541(c) or exemption under 522(b)(2)(A) have been squarely before the courts and Congress for almost a decade. The recent decisions of the Fifth and Ninth Circuits in *Dyke* and *Pitrat*, respectively, have brought the third leg of the triangle to the circuit level conflict. Debtors deserve better than to be left guessing about the fate of their pension plans, which have in many cases literally taken a lifetime to build. Creditors also should not have to enter into transactions without knowing the extent of their recourse in the event of a default.

In light of the record number of bankruptcies facing the courts, this issue clearly calls for immediate and unequivocal Congressional action addressing all three of these interrelated issues. The Supreme Court's denial of certiorari to *In re Lucas* just this summer indicates the high Court is hoping to avoid the issue by intervening Congressional activity, without which no quick uniform solution appears in sight. The Supreme Court in *Guidry* makes clear that courts should not carve out exceptions to ERISA's anti-alienation provisions on the basis of equity. However, many courts faced with debtors holding millions of dollars in pension plans have already fallen into this trap. Clearly it is not equitable to let a debtor walk away with thousands, even millions, of dollars while creditors are left with nothing, but the adage that bad facts make bad law is evident in this area. However, as Judge Kelly in *In re Volpe* pointed out, the decision of the amount to be left the debtor for a "fresh start" should be left to Congress and state legislatures. For example, Congress has seen fit to allow states to give unlimited homestead exemptions. The right amount is simply not

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[196] *In re* Komet, 104 Bankr. 799, 805 n.12 (Bankr. W.D. Tex. 1989).

a question for the courts. Another possible avenue states have tried while waiting for Congress is to amend the state spendthrift trust laws to include all ERISA qualified plans, thus satisfying the *Goff* criteria.[197]

In the meantime, which interpretation is correct? ERISA and the Bankruptcy Code are designed to provide security and prevent people from becoming a burden on the state. To allow a person to protect his retirement funds outside of bankruptcy but to lose this protection just when they step into the system designed to protect them flies in the face of Congressional intent. *In re Majul* notes that it clearly could not have been Congress' intention to protect "an imprisoned embezzler [such as] Guidry " while not protecting "an innocent, but insolvent," debtor.[198] The approach of the Fourth and Sixth Circuits is analytically more sound than the *Goff* line of cases. Section 541 is clear on its face while the legislative history is anything but clear as to whether Congress intended to limit the exclusion to spendthrift trusts.

The practical aspects of the problem require a different approach. The courts should bring the pension plans into the estate where the bankruptcy court can oversee them. However, courts should follow the Fifth Circuit in *Dyke* and let the state legislatures determine the size of any exemption. This allows the court to have some supervision of the funds while resting the exemption power where it should lie, in a legislative body.

The Internal Revenue Service presents the major obstacle to this approach by continuing to take a very hardline approach in private letter rulings. The mere inclusion of the plan in the estate is technically a violation of the anti-alienation provision. By jumping through the appropriate hoops the IRS may be persuaded to accept settlements under the direction of the bankruptcy court. While theoretically this is not the best position, Congress, unfortunately, can not be counted on for a quick and decisive solution.

Robert Hutchison

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[197] *See supra* notes 64-65 and accompanying text.

[198] *In re* Majul, 119 Bankr. 118, 123 n.5 (W.D. Tex. 1990).

DNA FINGERPRINTING: OVERVIEW OF THE IMPACT OF THE GENETIC WITNESS ON THE AMERICAN SYSTEM OF CRIMINAL JUSTICE

Introduction

Upon returning to her home, Miss Hill entered her darkened bedroom, only to be overcome from behind by a person who immediately blindfolded, then subsequently raped her. She never saw the man's face. As counsel for the defendant accused of the rape, you are faced with three pieces of evidence. The first two are circumstantial: Less than fifteen minutes after the attack, your client was involved in an automobile accident within two blocks of the victim's home; also, one of the victim's neighbors believes that he saw your client drive slowly past the victim's home several times earlier that day, in the same type and color of car wrecked by your client on the evening of the attack. The third bit of evidence is much more overwhelming. An expert for the prosecution testified that a DNA fingerprint[1] obtained from a semen stain on the victim's bedsheet matched a DNA sample obtained from a blood sample of the defendant. The expert testifies further that the chances of another person having this same DNA fingerprint are approximately one in 30 million; in other words, the expert is virtually certain that the defendant was the attacker. As defense counsel, you feel from the faces of the jurors that they made up their minds to return a verdict of guilty as soon as they heard such an astronomical figure.

The use of DNA testing in cases involving fact patterns such as this has skyrocketed in recent years. Since first being introduced in a criminal case in 1986, DNA tests have been admitted into evidence in at least 185 criminal cases in thirty-eight states and the U.S. military.[2] DNA tests have also been performed in at least 2,000 criminal investi-

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[1] Deoxyribonucleic acid (DNA) is the molecular genetic code in each living organism which determines that organism's unique characteristics. Although the term "fingerprint" is a misnomer when used in the DNA context, its use is universally accepted as a lay description of the process of matching DNA samples. Throughout this comment, the terms "DNA fingerprinting," "DNA profiling," and "DNA typing" are used interchangeably.

[2] OTA Report Brief, *Genetic Witness: Forensic Uses of DNA Tests*, Office of Technological Assessment (July 1990).

gations.[3] As of February 1990, the Federal Bureau of Investigation (FBI) had received over 6,000 samples from state and local police for DNA fingerprinting.[4] The successful use of DNA fingerprints as evidence in criminal cases has gained widespread attention through the press and its usefulness and reported reliability has induced prosecutors all across the nation to utilize DNA fingerprints as evidence in many criminal cases. As shown by the fact pattern above, such DNA evidence can be disastrous to a criminal defendant, so defense attorneys have attempted, with little success, to have such evidence excluded.

This comment will address the impact of DNA fingerprinting on the American criminal justice system, including an examination of its usage in Mississippi cases and acceptance by the Mississippi judiciary.[5] Part I of this comment discusses the mechanics of how a DNA fingerprint is obtained. Part II provides background information concerning early uses of DNA fingerprints in criminal investigations and trials. The legal standards for admitting scientific tests into evidence is examined in Part III. The use of DNA fingerprinting in the Mississippi criminal justice system is examined in Part IV. Part V focuses on various concerns with DNA fingerprinting.

I. Mechanics of DNA Fingerprinting

Chromosomes that are contained in human cells are the equivalent of a "human blueprint."[6] Except for identical twins, every person's DNA pattern is unique and distinct.[7] Possession of a unique DNA pattern by all persons facilitates the positive identification of a particular suspect or may work to exclude particular persons as suspects. Both the prosecution and defense can benefit at one time or another from a properly conducted DNA test.[8] It is imperative that both prosecutors

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[3] Marcotte, *Report: DNA Tests Valid*, 76 A.B.A.J. 26, 26 (October 1990).

[4] *Id.* The FBI anticipates that eventually it will be capable of processing 10,000 DNA samples annually. *Id.*

[5] For a discussion of the impact of DNA testing on paternity litigation, *see* Note, *Chromosome Testing—New, Improved Paternity Tests?*, 28 J. Fam. L. 753, 753-70 (1989-90) (authored by Germaine B. Shaffer); *see also* Fara, *Effect of DNA Testing on Paternity Litigation*, Am. J. Fam. L. 61 (Spring 1979) (DNA testing in paternity litigation).

[6] Kelly, Ranking & Wink, *Methods and Application of DNA Fingerprinting: A Guide for the Non-Scientist*, 1987 Crim L. Rev. 105, 105-06 (1987).

[7] Jeffreys, Wilson & Thein, *Individual-Specific "Fingerprints" of Human DNA*, 316 Nature 76, 77 (1985).

[8] Commercial firms that conduct DNA testing have predicted that the technique will aid in solving not only paternity and homicide cases, but also rape, assault, unidenti-

and defense lawyers understand the history and underlying theory of DNA typing as a prerequisite for proving whether the results obtained are reliable.

The technique often referred to as DNA fingerprinting was developed by a British scientist, Professor Alec Jeffreys of Leicester University, in the early 1980s.[9] Since perfection of the technique by Dr. Jeffreys in 1985, other scientists have developed alternative techniques, but all of these techniques essentially are different versions of Dr. Jeffreys' original procedure.[10]

A. Making the Fingerprint

The more commonly used method of DNA typing is called "restriction fragment length polymorphism analysis" or RFLP.[11] The RFLP analysis works as such:

First, the suspect's DNA is purified from a small sample.[12] This sample may consist of blood, semen, bone, saliva, urine, skin, hair, or tissue; all would yield the same results.[13] Restriction enzymes are then

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fied bodies, missing persons, unsolved crimes, and even hit and run. *Background Information: DNA-Print™ Identification Test.* Lifecodes Corporation (1991) (promotional literature). Cellmark anticipates that DNA profiling can be usefully applied to several areas, including cases of rape, homicide, paternity, unidentified bodies, immigration questions, cell line authentication, and pedigree determination in animals, *DNA Fingerprinting™ and DNA Profiling*, Cellmark Diagnostics (1989) (promotional literature). GeneScreen lists its common reasons for referral as homicides, sexual assaults, hit and run, and body identification. *GeneScreen-Identity Series*, GeneScreen (1989) (promotional literature).

[9] White & Greenwood, *DNA Fingerprinting and the Law*, 51 MOD. L. REV. 145, 145 (1988); *see also DNA Fingerprinting™* and *DNA Profiling*, *supra* note 8 (background information on Dr. Jeffreys).

[10] Comment, *A New Twist in the Double Helix: Admissibility of DNA "Fingerprinting" in California*, 2 COMPUTER & HIGH TECH. L.J. 469, 473 (1989) (authored by Adrienne M. Grover) [hereinafter *A New Twist*]; *see also* Comment, *Admit it! DNA Fingerprinting is Reliable*, 26 HOUS. L. REV. 677, 683-84 (1989) (authored by Suzanne H. Stenson) (discussing Dr. Jeffrey's development of DNA fingerprinting).

[11] This method is utilized by Cellmark Diagnostics and Lifecodes Corporation, two of the major commercial businesses that conduct DNA profiling. The FBI also utilizes this technique. Comment, *The Use of DNA Typing in Criminal Prosecutions: A Flawless Partnership of Law and Science?* 35 N.Y.L. SCH. L. REV. 485, 487, 493 (1989) (authored by Jessie Jo Barr). GeneScreen, a genetic testing lab in Dallas, also uses the RFLP analysis as its primary test. GeneScreen, *DNA Forensic Testing*, GeneScreen (1991) (promotional literature).

[12] Moss, *DNA-The New Fingerprints*, 74 A.B.A.J. 66, 69 (May 1, 1988).

[13] Note, *A Study in Scarlet: Criminal DNA Typing Reaches the Courts and Legislatures*, 6 J.L. & POL. 755, 755 (1990) (authored by Edward G. Burley).

used to cut the DNA strands at specific sites.[14] The fragments resulting from the cutting will differ in length and number for each person.[15] These fragments are then placed at one end of a sheet of gel and exposed to an electrical field in order to sort the fragments by size.[16] The fragments will move toward the field; smaller fragments move farther so segregation is accomplished according to size.[17] Use of the gel works well for separating the fragments, but is quite inconvenient for later phases of manipulating the DNA; therefore, the separated DNA is transferred to a thin sheet of nitrocellulose filter (a nylon membrane).[18] By this procedure, the fragments are transferred in exactly the same position they occupied in the gel.[19]

Next, in order to visualize fragments of interest, a DNA "probe" is used.[20] DNA probes are designed to attach to specific locations on the fragment.[21] Once the probe has attached, the nitrocellulose filter is placed on x-ray film which shows dark bands at the positions of the probes.[22] Viewed as a whole, the x-ray film looks like a bar code that appears on consumer products.[23]

This same method is completed for DNA samples found at the crime scene, or obtained from the victim's body. If the two "bar codes" match, then the samples are from the same person and the suspect is positively identified as the attacker.[24] If the "bar codes" do not match, then the person can be excluded as a suspect.[25]

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[14] Moss, *supra* note 12, at 69.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Burke, *DNA Fingerprinting: Possibilities and Pitfalls of a New Technique*, 31 JURIMETRICS J. 455, 460 (1988). This procedure is named Southern blotting after its inventor. *See generally*, Elder & Southern, *Measurement of DNA Length by Gel Electrophoresis II: Comparison of Methods for Relating Mobility to Fragment Length*, 128 ANAL. BIOCHEM. 227 (1983) (discussing Southern blotting technique).

[19] Burke, *supra* note 18, at 460.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Kelly, *supra* note 6, at 108.

[24] Moss, *supra* note 12, at 69.

[25] That is the usual procedure: If the "codes" do not match, charges probably will not be brought against the person. *But see* Ewing, *Conn. Jury Disregards DNA Test*, 12 NAT'L L.J. April 23, 1990, at 9, col. 1. In this Connecticut rape case, the jury ignored a DNA test performed on semen stains taken from the victim's panties that indicated that the defendant could not have been the rapist (the "bar codes" did not match). *Id.* Instead, the jury believed the victim's detailed, unwavering account of the attack. *Id.* Although her glasses were knocked off and she could not see her attacker clearly, she

A second technique of DNA typing is the polymerase chain reaction, or PCR technology.[26] With this technique, polymerase, an enzyme, is used to "amplify" target DNA sequences by creating at least a million copies of them.[27] The amplified DNA is "spotted" to a filter and treated with DNA probes which produce blue dots at the locations on the sequence where particular genes are found.[28] The product is a pattern of blue dots. If the pattern of blue dots on the sample matches the blue dots of the suspect's sample, then the suspect and the attacker are the same person. If there is no match, the suspect can be excluded.[29]

With both techniques, a match presumably means that both samples came from one source (person), since no two people (except identical twins) have the same DNA.[30] However, particular parts of the DNA molecule examined in a test may be identical in a suspect and another person; therefore, the testing lab must calculate how likely it is that the match occurred by chance (the probability that some other person

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remembered details concerning the interior of the attacker's car and picked the defendant out of three photo lineups. *Id.* This is the only such case the author has found where after a DNA "fingerprint" was admitted into evidence, the jury chose not to trust in the "print" which exonerated the defendant, but believed the victim's testimony instead.

[26] Moss, *supra* note 12, at 69. This technology was used first in amniocentesis to perform prenatal diagnosis. *Id.* Cetus Corporation markets a genetic analysis kit which employs the PCR method; GeneScreen is a purchaser of this kit. Telephone interview with Dr. Robert C. Giles, Scientific Director of GeneScreen (Oct. 16, 1991).

[27] Moss, *supra* note 12, at 69. GeneScreen considers PCR as an alternative to the more accurate RFLP method. GeneScreen, *DNA Forensic Testing*, GeneScreen (1991) (promotional literature). The PCR analysis is used by GeneScreen when a DNA sample is inadequate for the RFLP analysis, either because the sample is too small or is degraded. *Id.*

[28] Moss, *supra* note 12, at 69.

[29] The explanation concerning how DNA typing is done is simplified in this comment. A review of the literature will provide a more comprehensive and detailed analysis on how DNA fingerprinting is conducted. *See generally* Epstein, *The Problem with DNA Tests: Cross-Examining the DNA Fingerprint*, 78 ILL. B.J. 392, 393-97 (1990) (discussing genetic theory underlying DNA testing and techniques used in obtaining DNA fingerprints); Honma, Yoshii, Ishyyama, Mitani, Komianami & Muramatsu, *Individual Identification from Semen by the Deoxyribonucleic (DNA) Fingerprint Technique*, 35 J. FORENSIC SCI. 222, 222-27 (1990) (technical note by medical doctors of University of Tokyo concerning practical experiments conducted utilizing DNA Fingerprinting); Note, *supra* note 13, at 760-80 (discussing theory and process of DNA typing); *A New Twist*, *supra* note 10, at 472-77 (analyzing techniques involved in DNA analysis); Note, *DNA Fingerprinting: Dick Tracy of the '90's*, 4 ST. JOHN'S J. LEGAL COMMENT. 183, 185-91 (1989) (authored by Nancy Slater) (discussing how DNA analysis was developed and how it is applied today); Thompson, *DNA Fingerprinting: Who Does It and How*, 8 CAL. LAW. 41, 41-43 (June 1988) (examining theory and techniques of DNA fingerprinting).

[30] Shoop, *Is DNA Typing Ready for Trial?*, 26 TRIAL 11, 11 (Sept. 1990).

other than the suspect or victim would yield the same DNA fingerprint).[31] Much controversy has arisen over the statistical basis for calculating these probabilities. This issue, along with the commercial firms' claims of accuracy, will be discussed later in this comment.

B. Who Conducts DNA Fingerprinting

The most common method of DNA profiling, the RFLP analysis, is utilized by private firms[32] such as Cellmark Diagnostics (Cellmark),[33] Lifecodes Corporation,[34] and GeneScreen.[35] The FBI also uses this analysis in supporting law enforcement agencies throughout the United States.[36] Cetus Corporation and GeneScreen use the PCR tech-

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[31] *Id.*

[32] Presently, numerous laboratories conduct DNA fingerprinting; the number of labs is expected to continue to grow. Telephone interview with Dr. Robert C. Giles, Scientific Director of GeneScreen (Oct. 16, 1991). The list of labs discussed herein is not intended to be exclusive.

[33] Formed in 1987, Cellmark Diagnostics U.S., a division of ICI Americas, Inc., is based in Germantown, Maryland and Abington, England. ICI Americas, Inc. is the United States subsidiary of Imperial Chemical Industries PLC, a British-based multinational chemical and pharmaceutical company. "DNA Fingerprint" is a patented term used by Cellmark. Cellmark Diagnostics, *DNA Fingerprinting and DNA Profiling* (1989) (promotional literature). Cellmark has a turn-around time for the sample to be analyzed and returned to the source of four to eight weeks for a preliminary report (assuming the sample is not a match; there is an additional 4 to 8 weeks if the sample is a match, for a final report). Telephone interview with Mark Stolorow, Manager of Forensic Services for Cellmark Diagnostics (Oct. 17, 1991). Cellmark reports providing expert testimony in approximately 12% of the cases for which they process samples. *Id.*

[34] Lifecodes Corporation, based in Valhalla, New York, is a licensed clinical laboratory of the state of New York. Formed in 1982, Lifecodes is a division of Quantum Chemical Corporation. The "DNA-Print" Identification test is a patented term used by Lifecodes. First use of the test for forensic purposes was offered in 1987. Lifecodes also markets this test as a kit to other laboratories. Lifecodes Corporation, *Background Information: DNA-Print Identification Test* (1991) (promotional literature). Lifecodes has a turn-around time of 10-12 weeks. Telephone interview with Kathy Brock, forensic serologist with the Mississippi Crime Lab (Oct. 16, 1991).

[35] Incorporated in November, 1987 as an outgrowth of Dallas Biomedical Corporation, GeneScreen, located in Dallas, Texas, was the first lab in the southwestern United States to offer DNA forensic testing. GeneScreen prefers the RFLP analysis, but it does occasionally make use of the PCR technique to analyze degraded or small DNA samples. GeneScreen, *DNA Forensic Testing*, GeneScreen (1991) (promotional literature). A turn-around time of six to eight weeks for the analyzed sample to be returned to the source is promised by GeneScreen. *GeneScreen-Identity Series*, GeneScreen (1989) (promotional literature). GeneScreen analyzes an annual volume of samples comparable to that of other major laboratories. Telephone interview with Dr. Robert C. Giles, Scientific Director of GeneScreen (Oct. 16, 1991).

[36] The FBI opened its lab in Quantico, Virginia in January, 1989. Many critics ex-

nique.[37] Each of the private laboratories has its own technique, but Dr. Jeffreys' original procedure is used only by Cellmark Diagnostics, which has the exclusive worldwide license to market it.[38]

Until recently, when the FBI entered the DNA profiling field, all of the DNA profiling test were performed by one of the commercial labs. The entry of the FBI into the field should change the economics of the courtroom concerning DNA profiling. The services of the FBI lab are offered free to any law enforcement agency.[39] As a result, the private laboratories will likely be used more by the defense (or prosecutors unwilling to wait six to eight months for a sample to be returned by the FBI), who will have to pay substantial amounts for the actual testing and corresponding expert testimony.[40] Since many perpetrators

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pect the FBI to set the mark for internal lab standards for DNA profiling. Williams, *Conviction by Chromosome*, 18 STUDENT LAW. 26, 31 (Dec. 1989). "DNA Profiling" is the terminology used by the FBI. Before adopting a particular technique, the FBI did extensive research on both the techniques of Lifecodes and Cellmark. The FBI lab is presently using the Cellmark DNA Fingerprinting Technique. Watson, *FBI Adopts DNA Test at Pioneer's Expense*, LEGAL TIMES, Mar. 27, 1989, at 12, col. 4. A problem with the FBI lab is its slow turnaround time; six to eight months are required for the FBI to complete its analysis and return the sample and final report to the requesting agency. Telephone interview with Kathy Brock, forensic serologist of the Mississippi Crime Lab. (Oct. 16, 1991).

[37] Cetus Corporation (Cetus), of Emeryville, California, utilizes a technique termed "Polymerase Chain Reaction" (PCR), also referred to as "DNA Amplification of GeneAmp™." GeneScreen, *DNA Forensic Testing*, GeneScreen (1991) (promotional literature). The PCR technique is novel when compared to the RFLP analysis. Questions concerning the reliability of the PCR technique have arisen. Thompson & Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45, 50 (1989). GeneScreen also uses the PCR technique to analyze degraded or small samples of DNA. Telephone Interview with Dr. Robert C. Giles, Scientific Director of GeneScreen (Oct. 16, 1991).

[38] Cellmark Diagnostics, *DNA Fingerprinting and DNA Profiling*, Cellmark (1989) (promotional literature).

[39] Williams, *supra* note 36, at 31. In order for the FBI lab to test a person, that person must be a known suspect. *Id.* at 32. The majority of the samples are blood drawn as a result of a court order, but suspects may also voluntarily submit samples. *Id.* Even though the samples submitted to the FBI are only those of prime suspects, in 20% of the samples tested, the DNA profile does not match the suspect in question. *Id.*

[40] Lifecodes charges at least $485 per sample for analysis and $800 (non-Ph.D.) to $1,200 (Ph.D.) per day, plus expenses, for expert testimony. Telephone interview with Patty Strow, Customer Service Representative of Lifecodes Corporation (Oct. 22, 1991). The cost for a test by Cellmark is $550 per test and from $750 to $1,000 plus expenses per day for an expert witness, depending upon whether the expert is a staff molecular biologist or has a Ph.D. Telephone interview with Mark Stolorow, Manager of Forensic Services for Cellmark Diagnostics (Oct. 17, 1991). GeneScreen charges $375 per sample for forensic analysis and $750 per day, plus expenses, for expert testimony. *GeneScreen-*

of violent crimes are poor people represented by county public defenders, these costs may be prohibitive to them. Given this, questions arise concerning whether such a defendant will be able to afford adequately to challenge an incriminating DNA analysis.[41] One possible solution rests with pro bono DNA identification programs. Recently Cellmark, in conjunction with the Southern Prisoner's Defense Committee, established the nation's first pro bono DNA identification program.[42] Defense attorneys with indigent clients are thus afforded the opportunity to have DNA technology utilized to analyze relevant physical evidence free of charge.[43] Cellmark's generous program is a significant, but small,[44] step in solving the problem presented by indigent defendants' need for DNA profiling technology; it remains to be seen how many other commercial laboratories will follow Cellmark's lead.

While traditional semen and blood tests can usually pinpoint a suspect with ninety to ninety-five percent certainty, proponents of DNA profiling claim that identification of a suspect can be accomplished with "virtual certainty."[45] The various laboratories that conduct DNA profiling have their own claims as to how accurate their tests are. Cellmark claims that its "DNA Fingerprint" test can identify a suspect with "virtual certainty."[46] According to Cellmark, the chances of any two people having the same DNA fingerprint are one in thirty billion.[47] Lifecodes asserts that when a match is produced in its

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Identity Series, GeneScreen (1991) (promotional literature).

[41] Williams, *supra* note 36, at 31. One such indigent defendant was represented by a public defender who spent nine months preparing for trial at the expense of his private practice, earned only $14,000 that year as a part-time public defender, and whose preparation for trial cost the public defender's office in excess of $50,000. Even at such costs, the public defender was not successful in challenging a DNA sample that matched the defendant. The defendant was found guilty and sentenced to 51 years in prison. *Id.* at 32.

[42] *Cellmark Digest, The DNA News Source*, Cellmark Diagnostics (Spring 1991) (promotional newsletter).

[43] *Id.* More than 30% of the suspects are excluded when cases with conclusive findings are analyzed. *Id.*

[44] *Id.* Cellmark will accept up to six pro bono cases in 1991. *Id.*

[45] Moss, *supra* note 12, at 66.

[46] *Id.* While Cellmark does not claim its test to be 100%, Cellmark does assert that its test is a virtually absolute identification of a person, a 99.9% identification. Williams, *supra* note 36, at 28.

[47] Moss, *supra* note 12, at 66. Remember that since identical twins have the same DNA, their DNA fingerprints will always match. The inventor of DNA Fingerprinting™, Dr. Jeffreys, claims a one in one quadrillion chance that two unrelated persons will have the same DNA "fingerprint," and a one in ten trillion chance of identical DNA fingerprints among siblings. Williams, *supra* note 36, at 28.

DNA-Print test, there is at least a ninety-nine percent certainty that the DNA samples came from the same person.[48] The RFLP test used by GeneScreen is claimed to have the ability of identifying one person in more than ten million.[49] Cetus does not claim that a match in its test provides an identification of a suspect with "virtual certainty" like Cellmark and Lifecodes, but Cetus does boast of better statistics than with the traditional semen and blood tests.[50] The most conservative statistics concerning the possibility of a coincidental match are expressed by the FBI. While a test by one of the private labs might say the chance of a coincidental match is one in thirty million, the same test by the FBI might show the chance of a coincidental match as being one in three million.[51] All of the statistics claimed by the private labs and the FBI are impressive, but are they accurate?[52]

II. Early Uses of DNA Profiling in Criminal Investigations and Trials

The first criminal conviction in the world based on DNA profiling evidence occurred in the rape case of Robert Melias on November 13, 1985.[53] Britain's Scotland Yard successfully used DNA fingerprinting to secure a plea of guilty by Melias after he was confronted with evidence of a DNA match.[54]

The most publicized early criminal case in which DNA evidence was utilized was that of the Narborough Murder Enquiry.[55] This case revealed that not only could a DNA fingerprint identify the guilty, but also could exonerate the innocent. This case centered in the town of Narborough in Leicestershire, the home of the DNA laboratory of Dr. Alec Jeffreys, the inventor of DNA fingerprinting.[56] After a seventeen-year-old hospital worker confessed to the rape and strangulation of two

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[48] Moss, *supra* note 12, at 66.

[49] GeneScreen, *DNA Forensic Testing*, GeneScreen (1991) (promotional literature).

[50] Moss, *supra* note 12, at 67. GeneScreen uses Cetus' PCR kit and asserts that this method has the ability to identify one person in 20 and to exclude 95 to 99%. GeneScreen, *DNA Forensic Testing*, GeneScreen (1991) (promotional literature).

[51] Williams, *supra* note 36, at 31. The statistics expressed by the FBI are on the order of 10 to 100 less than that of the private labs. *Id.*

[52] This questions is addressed under Part V: Concerns with DNA Fingerprinting.

[53] Note, *supra* note 13, at 785.

[54] *Id.* Melias pleaded guilty after being confronted with a DNA match of his DNA pattern and that of a semen stain left on the clothing of a 43 year-old handicapped woman he raped. *Id.*

[55] *Id.* at 786.

[56] *Id.*

young girls, police asked Dr. Jeffreys to perform a DNA analysis to determine if the boy who had confessed was indeed the perpetrator of the crime. Dr. Jeffreys determined that the boy's DNA fingerprint did not match the DNA pattern of sperm found in one of the victim's bodies; however, the test did connect both murders to a common killer. Dr. Jeffreys and his staff collected blood samples from the entire male population in the area and after examining all of the samples (more than 5500), they still had no match with the DNA pattern of the sperm obtained from the victim. An overheard pub conversation revealed that one man in the area had donated two samples: one for himself and another for a co-worker who had requested he do so. After the man identified his co-worker as Colin Pitchfork, Jeffreys and his staff tested Pitchfork's blood. The DNA analysis done on Pitchfork's blood revealed a match of his DNA band pattern with that of the DNA band pattern in the sperm sample. Pitchfork confessed to the crimes after being confronted with the DNA evidence and subsequently was sentenced to life in prison.[57]

Subsequent to the Narborough Murder Enquiry, the concept of DNA profiling received vast publicity and has enjoyed immense popularity in the United States and abroad.[58]

III. Admissibility of DNA Evidence in United States Courtrooms

Prior to DNA profiling evidence being used in the courtroom, the requisite standard for admissibility must be satisfied. Basically there are two different legal standards that new scientific evidence must satisfy before being deemed admissible in court.[59] The first standard, utilized by approximately two-thirds of the states, is derived from *Frye v. United States*.[60] The other one-third of the states employ a "relevancy" standard to determine admissibility.[61]

A. The Frye Standard

In *Frye*, the defense argued for the admission into evidence of the forerunner of the lie detector test, a systolic blood pressure deception test.[62] The trial court refused to admit the blood pressure test, and the Court of Appeals for the District of Columbia affirmed by stating:

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[57] *Id.*

[58] *See supra* notes 2-4 and accompanying text.

[59] Williams, *supra* note 36, at 26.

[60] 293 F. 1013 (D.C. Cir. 1923).

[61] Williams, *supra* note 36, at 26.

[62] *Frye*, 293 F. at 1013.

> Just when a scientific principle of discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[63]

The basic premise underlying *Frye* is that scientific evidence is admissible only when the principle or technique has gained general acceptance in the relevant scientific community.[64]

While it appears that some courts have adopted *Frye* to exclude scientific evidence,[65] some of which is arguably reliable, acceptance of *Frye* has not been universal.[66] The most significant complaint concerning the *Frye* standard is the vagueness of its language. What is "the particular field in which it belongs"? To what part of the scientific community do we look to? Such difficulties as these prompted some

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[63] *Id.* at 1014.

[64] *Id.*; *see also* E. Imwinkelreid, P. Gianelli, F. Gilligan, & F. Lederer, COURTROOM CRIMINAL EVIDENCE § 605, at 120 (1987) (*Frye* imposed on proponents of scientific evidence special burden of demonstrating that technique at issue was generally accepted by scientific field to which it belonged). Professor Imwinkelried is of the opinion that *Frye* delegates the decision concerning whether to admit scientific evidence, out of the judge's hands. Instead, what is required is a "headcount" of proponents of the evidence in the relevant scientific community. Williams, *supra* note 36, at 28.

[65] *See, e.g.*, United States v. Brown, 557 F.2d 541, 559 (6th Cir. 1977) (rejected ion microprobic analysis of hair as unreliable); United States v. Alexander, 526 F.2d 161, 170 (8th Cir. 1975) (upholding exclusion of polygraph test on basis of insufficient scientific acceptance); Lindsey v. United States, 237 F.2d 893, 898 (9th Cir. 1956) (overturned admission of psychologist's interview while interviewee was under influence of sodium pentothal); United States v. Hearst, 412 F. Supp. 893, 895 (N.D. Cal. 1976) (upholding exclusion of psycholinguistic testimony due to lack of general acceptance among physical and scientific authorities).

[66] *See, e.g.*, United States v. Franks, 511 F.2d 25, 33 n.12 (6th Cir. 1975) (upholding admission of spectrographic analysis because courts may deem reliable scientific processes to be generally accepted); State v. Olivas, 77 Ariz. 118, 119, 267 P.2d 893, 894 (1954) (scientific disagreement goes to weight, not admissibility of evidence); People v. Allweiss, 48 N.Y.2d 40, 49-50, 396 N.E.2d 735, 740 (1979) (unless expert is called to assess veracity, expert opinion is admissible when it can be stated with reasonable degree of certainty); *see also* Gianelli, *The Admissibility of Novel Scientific Evidence*: Frye v. United States, *A Half-Century Later*, 80 COLUM. L. REV. 1197, 1205, 1207-21 (1980) (discussing elements of *Frye* that courts have interpreted differently); Lewis, *DNA Fingerprints - Witness for the Prosecution*, DISCOVER June, 1988, at 44, 52 (conviction of rapist based on DNA Fingerprinting).

courts to adopt modified versions or variations of the *Frye* test.[67] In *Coppolino v. State*,[68] the defendant appealed his murder conviction based on the contention that the trial court erroneously admitted the results of a newly developed toxicological test able to detect toxins that were previously undetectable in the body.[69] The trial court's decision was upheld on appeal because of the lack of a clear showing of abuse of discretion.[70] Despite the testimony of expert witnesses challenging the methods and conclusions of the state's scientific witnesses, the appellate court found no abuse of discretion.[71] The *Coppolino* court referred to *Frye* in its opinion, but did not require the toxicological test at issue to be "generally accepted in the relevant scientific community."[72] Subsequent to this decision, courts have invoked *Coppolino* to show the court's discretion in admitting relevant, otherwise admissible scientific evidence, in spite of the lack of general scientific acceptance.[73] Despite its difficulties, the *Frye* requirement of general acceptance in the scientific community remains the prevailing standard for the admissibility of new scientific evidence.[74]

It would seem that a jurisdiction that follows a strict *Frye* standard would not allow DNA fingerprints to be admitted until DNA profiling is generally accepted. While the theory underlying DNA profiling does seem to have general acceptance, many renowned scientists (and lawyers) complain of inaccuracies in testing, lack of validation testing, lack of lab regulation, improper statistical populations, and lack of standardized procedures for labs and their DNA profiling techniques.[75]

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[67] Burke, *supra* note 18, at 68.

[68] 223 So. 2d 68 (Fla. Dist. Ct. App. 1968).

[69] *Coppolino*, 223 So. 2d at 70.

[70] *Id.* at 70-71.

[71] *Id.* at 70.

[72] *Id.*

[73] *See, e.g.*, Brown v. State, 426 So. 2d 76, 87 (Fla. 1st D.C.A. 1983) (*Coppolino* not only rejects *Frye*, but also utilizes test focusing on relevancy as key to admissibility); People v. Barbara, 400 Mich. 352, 255 N.W.2d 171, 182 (1977) (*Coppolino* held that lack of general acceptance affects not admissibility, but weight of evidence); Jones v. State, 716 S.W.2d 142 (Tex. Ct. App. 1986) (scientific evidence should be treated like any other evidence).

[74] Williams, *supra* note 36, at 26.

[75] Various criticisms concerning DNA profiling techniques exist in the literature. *See* Epstein, *The Problem with DNA Tests: Cross-Examining the Fingerprint*, 78 ILL. B.J. 392, 394-97 (1990) (addressing problems with sampling, measurements, and interpretations of the test results); Gonzales, *Attacking Forensic DNA Profiling Evidence of Lack of Validation*, 46 NAT'L LAW. GUILD PRAC. 51, 51-55 (1989) (discussing lack of validation testing in DNA profiling); Lander, *DNA Fingerprinting on Trial*, 339 NATURE 501, 501-05 (June 15, 1989) (discussing lack of standards to ensure reliability of DNA

Until some of these problems are cured and a consensus of scientists in the community agree that the techniques are generally accepted, a jurisdiction strictly following *Frye* may not admit DNA profiling evidence. Jurisdictions following *Coppolino* probably would admit DNA profiling evidence before these complained of problems are solved, thus limiting a defendant's challenge to an attack on the accuracy of the particular test.

B. The Relevancy Standard

Instead of adopting *Frye*, some states determine admissibility based on a relevancy approach[76] that is derived from the balancing test of the Federal Rules of Evidence[77] Rules 401, 403, and 702. In *United States v. Downing*,[78] the defendant appealed his conviction for mail fraud, wire fraud, and interstate transportation of stolen property on the basis that the trial court had improperly excluded proffered expert testimony on the unreliability of eyewitness testimony.[79] The *Downing* court applied the relevancy approach in stating that the trial court should consider "(1) the soundness and reliability of the process . . . (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between disputed fact issues in the case . . ."[80] in ascertaining the admissibility of new scientific methods. The factors considered by the court in *Downing* are essentially the same as with Federal Rules 401, 403, and 702.[81]

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evidence); Marcotte, *supra* note 3, at 26 (Office of Technology Assessment report says quality assurance in DNA profiling is needed); Neufeld & Scheck, *DNA Testing: Is Forensic DNA Testing Reliable*, 76 A.B.A.J. 34, 35 (Sept. 1990) (calling for standards on declaring DNA "matches" and calculating probabilities); Shoop, *Is DNA Ready for Trial?* 26 TRIAL 11, 12-14 (Sept. 1990) (calling for quality control and legislation to assure reliability in DNA profiling results); Thompson & Ford, *DNA Typing: Promising Forensic Technique Needs Additional Validation*, 24 TRIAL 56, 56-64 (Sept. 1988) (calling for additional validation of DNA profiling before admitting into court).

[76] *See* United States v. Ferri, 778 F.2d 985, 989 (3d Cir. 1985) ("[D]istrict court committed no abuse of discretion when it determined that . . . testimony was sufficiently reliable to be admitted at trial."), *cert. denied*, 476 U.S. 1172 (1986); Kruse v. State, 483 So. 2d 1383, 1385-86 (Fla. Dist. Ct. App. 1986) (expert evidence is admissible despite lack of general acceptance if witness is qualified as expert, and evidence is material and helpful to fact-finder without unduly prejudicing opposing party); Brown v. State, 426 So. 2d 76, 87-88 (Fla. Dist. Ct. App. 1983) (rejecting *Frye*, and stating that all evidence which is logically and legally relevant is admissible).

[77] Federal Rules of Evidence are referred to as the Federal Rules.

[78] 753 F.2d 1224 (3d Cir.), *aff'd*, 780 F.2d 1017 (1985).

[79] *Downing*, 753 F.2d at 1127-37.

[80] *Id.* at 1237.

[81] Federal Rule 401 defines relevant evidence: " 'Relevant Evidence' means evidence

Utilizing this approach, a court could admit evidence of DNA fingerprinting so long as the probative value of the evidence is not "substantially outweighed" by its prejudicial effect on the jury. Under this approach, lack of general acceptance does not automatically cause inadmissibility, but it does weigh in the determination of whether the evidence is sufficiently reliable to assist the fact-finder.[82] In comparison with the *Frye* standard, the relevancy standard appears to be less restrictive in admitting new scientific tests into evidence and provides for judicial discretion in admitting "cutting edge" technology, thus avoiding *Frye*'s possible preclusion of relevant evidence due to a lag between scientific advances and judicial acknowledgement of the general acceptance of these advances.[83] A danger with this approach is that a court might admit scientific techniques too soon, then later the same technique may be determined to be unreliable.

C. *Cases Concerning the Admission of DNA Fingerprinting into Evidence*

The first case in which DNA fingerprinting was allowed into evidence in the United States was *State v. Hunt*,[84] an Oklahoma case in which thirty-seven-year-old Bobby Joe Hunt stood accused of murder. In this case, the blood of a missing person, presumed dead, had been found on Hunt's vacuum cleaner hose.[85] The prosecution introduced DNA evidence that the DNA pattern on the hose matched that of the missing person.[86] Despite this circumstantial evidence, Hunt was acquitted of murder.[87] This first case where DNA evidence was held admissible was also rare in that the criminal defendant, although faced with incriminating DNA evidence, was acquitted; the overwhelming

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having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Federal Rule 403 explains that "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading [of] the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403. Federal Rule 702 considers *as* admissible, a "scientific, technical, or other specialized knowledge [which] will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." A witness qualified as an expert may testify accordingly. FED. R. EVID. 702.

[82] *Downing*, 753 F.2d at 1238.

[83] *Id.* at 1237.

[84] No. CRF861541 (Norman, Okla., Sept. 15, 1987).

[85] Moss, *supra* note 12, at 68.

[86] *Id.*

[87] *Id.*

majority of such cases end in a conviction.[88]

The first appellate court to affirm the admissibility of DNA fingerprinting was the Florida Court of Appeals in the rape case of *Andrews v. State*.[89] In *Andrews*, the rapist entered the victim's home while she slept, jumped on her and covered her face with a sleeping bag; thus, she never saw his face during the course of the rape.[90] Lifecodes conducted a DNA fingerprinting test on semen obtained from a vaginal swab of the victim.[91] At trial, an expert from Lifecodes testified that the DNA pattern from the vaginal swab was a match with a sample obtained from the defendant and that the probability of the match being a coincidence was one to 839,914,540.[92] Andrews was convicted and sentenced to seventy-eight years in prison based on this DNA evidence. On appeal, the Florida Court of Appeals adopted the relevancy standard.[93] However, this case is not a resounding endorsement of the relevancy standard because the court found the DNA-print test to be generally accepted in the community;[94] thus, the same decision could have been reached under *Frye*.[95]

Jurisdictions adhering to *Frye* have admitted DNA fingerprinting as well. In two New York cases, *People v. Wesley* and *People v. Bailey*,[96] the prosecution moved the Albany County Court to order blood be extracted and hair samples taken from two defendants indicted in separate cases.[97] The prosecution in *Wesley* sought to show that bloodstains on the defendant's clothing were not his own, while the prosecution in *Bailey* sought to compare DNA from the defendant's blood with the DNA obtained from tissue samples of a fetus aborted by the victim.[98] The court held that the DNA fingerprinting test was reliable,

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[88] *Note*, *supra* note 13, at 788; *cf.* Ewing, *supra* note 25, where a jury in convicting a defendant ignored a DNA fingerprint that would have exonerated him.

[89] 533 So. 2d 841 (Fla. Dist. Ct. App. 1988).

[90] *Andrews*, 533 So. 2d at 842.

[91] *Id.* at 843.

[92] *Id.*

[93] *Id.* at 846-47.

[94] *Andrews*, 533 So. 2d at 847-48.

[95] *Id.* at 847 n.6.

[96] 533 N.Y.S.2d 643 (N.Y. Crim. Ct. 1988). Before the court were two unrelated cases in which the prosecution had moved for the court to order samples be taken from the defendants for DNA testing. *Id.* at 643.

[97] *Id.* George Wesley was charged with burglary and was suspected of rape and murder of a mentally retarded woman, while Cameron Bailey was charged with rape. *Id.* at 659.

[98] *Id.* In *Wesley*, DNA retrieved from the defendant's clothing had previously been positively matched with DNA obtained from the victim. *Id.*

generally accepted in the relevant scientific field, and that the DNA test results would be admissible in both the separate criminal prosecutions.[99]

Of all of the courts considering the admissibility of DNA fingerprinting, at least two courts have held the tests to be inadmissible. The admissibility of DNA fingerprinting had a perfect record until *People v. Castro*.[100] In *Castro*, the defendant was accused of the stabbing death of a woman who was seven months pregnant and of the woman's two-year-old daughter.[101] Bloodstains that the defendant claimed as his own were found on the defendant's watch when he was arrested. Lifecodes tested the blood stains on the watch and an expert for them declared at the *Frye* hearing that the DNA pattern from the blood on the watch matched that of the mother.[102] In a lengthy *Frye* hearing, the court held that the DNA-fingerprinting technique was generally accepted by the relevant scientific community, but refused to allow this particular test result into evidence because "the testing laboratory failed in several major respects to use the generally accepted scientific techniques . . . for obtaining reliable results, within a reasonable degree of scientific certainty."[103]

Opponents of DNA fingerprinting claimed that the *Frye* hearing in *Castro* brought to light flaws in the scientific procedures, lab standards, and statistics used in DNA profiling.[104] Proponents of DNA fingerprinting disagreed by stating that the court held the technique to be generally acceptable and that the only problem in *Castro* was that this single test was a "lemon."[105]

In *State v. Schwartz*,[106] the Minnesota Supreme Court acknowledged the validity of DNA fingerprinting, but refused admissibility in

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[99] *Id.* at 643, 659. During the *Frye* hearing, the court determined the standard to be whether the DNA fingerprinting had been generally accepted as reliable, not whether the technique had been "unanimously endorsed" by the scientific community. *Id.* at 645.

[100] 545 N.Y.S.2d 985 (S. Ct. Bronx Co. 1989).

[101] *Castro*, 545 N.Y.S.2d at 985.

[102] *Id.* at 985-86.

[103] *Id.* at 999. Instead of relying on Lifecodes' objective standard of computer measurements to determine a match, the expert "eyeballed" it and reached the wrong conclusion. Williams, *supra* note 36, at 29.

[104] Williams, *supra* note 36, at 29.

[105] *Id.* For a more in depth view of the *Frye* hearing in the *Castro* case, *see* Parloff, *How Barry Scheck and Peter Neufeld Tripped Up the DNA Experts*, 11 AM. LAW 50, 50-56 (Dec. 1989) (discussing the role of the defense in *Castro*); Sherman, *DNA Tests Unravel?*, 12 NAT'L L.J., Dec. 18, 1989 at 23, col. 1 (discussion of *Castro*); Anderson, *DNA Evidence Questioned*, 75 A.B.A.J. 18-19 (Oct. 1989) (*Castro* case discussed).

[106] 447 N.W.2d 422 (Minn. 1989).

the case based on procedures used by Cellmark and the fact that Cellmark had not published its population genetics studies.[107]

IV. A Mississippi Perspective

DNA Fingerprinting has enjoyed popular use in Mississippi as well as in other states. To date, the Mississippi Crime Laboratory has sent samples from fifty-five separate cases to be analyzed.[108] Of this number, thirty-one of the analyses were conducted by the FBI, sixteen by Cellmark, five by GeneScreen, two by GeneTest,[109] and one by Lifecodes.[110] Eight of the fifty-five cases have been tried;[111] two were set for trial in November 1991, while an undetermined number are either awaiting trial, have test results pending, or have resulted in the entry of a guilty plea after the defendant was faced with a matching DNA fingerprint.[112] Most of the fifty-five cases were rape investigations, while others were investigations for murder, sexual assault, and burglary.[113]

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[107] *Schwartz*, 447 N.W.2d at 427-28. By so ruling in *Schwartz*, the Minnesota Supreme Court became the first appellate court in the country to deny the admissibility of DNA fingerprinting evidence. Sherman, *DNA Tests Unravel*, Vol. 12, No. 15 Nat'l L.J. 1, 24 (Dec. 18, 1989).

[108] Telephone interview with Kathy Brock, forensic serologist with the Mississippi Crime Lab. (Oct. 17, 1991).

[109] GeneTest is a genetic testing laboratory located in Metararie, Louisiana. Telephone interview with Kathy Brock, forensic serologist with the Mississippi Crime Lab. (Oct. 16, 1991).

[110] Telephone interview with Kathy Brock, forensic serologist with the Mississippi Crime Lab. (Oct. 22, 1991). Lifecodes, GeneScreen and GeneTest have each yet to provide expert testimony in a Mississippi criminal case. *Id.* Dr. Robert Giles of GeneScreen did, however, provide expert testimony in a Belzoni, Mississippi paternity case during October, 1991. Telephone interview with Dr. Robert C. Giles, Scientific Director of GeneScreen (Oct. 16, 1991).

[111] *See* State v. Frierson, No. 9422 (Adams Co. Cir. Ct. 1991) (murder/sexual assault case); State v. Polk, No. 10458-V (Warren Co. Cir. Ct. 1990) (murder case); State v. Jenkins, No. CR-89-12-C(D) (DeSoto Co. Cir. Ct. 1989) (murder case); State v. Mettetal, No. CR-89-27-B (Union Co. Cir. Ct. 1989) (murder case); State v. Parker, No. 88-1/398 (Neshoba Co. Cir. Ct. 1989) (murder/sexual assault case); State v. Weaver, No. 4153H (Hinds Co. Cir. Ct. 1989) (rape case). Cellmark conducted the analyses and provided expert testimony in each of these cases. *Cellmark Diagnostics in Court*, Cellmark Diagnostics (1991) (promotional literature listing cases in which Cellmark has provided expert testimony). Expert testimony was provided by the FBI in the two other Mississippi cases (not listed herein) that have completed trial. Telephone interview with Kathy Brock, forensic serologist with the Mississippi Crime Lab (Oct. 22, 1991).

[112] Telephone interview with Kathy Brock, forensic serologist with the Mississippi Crime Lab. (Oct. 22, 1991).

[113] *Id.* Other uses of DNA fingerprinting in Mississippi have been in paternity cases

DNA fingerprinting evidence was admitted in each of the eight Mississippi cases that have gone to trial; however, none of these cases are reported decisions.[114] As of this writing, a decision is pending before the Mississippi Supreme Court in *State v. Jenkins*.[115] In 1989, William Wayne Jenkins was convicted of murder in the Circuit Court for DeSoto County after evidence of a matching DNA fingerprint and the testimony of an expert from Cellmark were admitted.[116] The grounds for appeal in *Jenkins* are procedural and do not involve the question of whether DNA fingerprinting satisfies the *Frye* standard of admissibility.[117]

In only three of the eight Mississippi cases having gone to trial, were *Frye* hearings conducted to determine whether DNA fingerprinting was generally accepted in the relevant scientific community.[118] In *State v. Frierson*,[119] *State v. Polk*,[120] and *State v. Parker*,[121] the circuit courts of Adams, Warren, and Neshoba Counties, respectively, determined DNA fingerprinting to be generally accepted. This question has yet to reach the Mississippi Supreme Court, but in light of the available supportive scientific literature and the vast number of jurisdictions which have previously determined DNA fingerprinting to be generally accepted, one would expect Mississippi to follow suit.

V. Concerns

The use of DNA fingerprinting in criminal trials and investigations has skyrocketed to the point where the theory itself is very widely accepted.[122] But the procedures used in practice of the theory of DNA fingerprinting are not flawless. There are advantages and disadvantages with which the legal and scientific communities must be con-

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and in a civil rape case. *Id.*

[114] *Id.*

[115] No. 89-DP-1293 (Miss. 1991).

[116] Conversation with Justice James L. Robertson, Mississippi Supreme Court Justice (Oct. 11, 1991).

[117] *Id.* At oral argument before the court, the defendant, William Wayne Jenkins, contended that he lacked adequate time for discovery concerning an expert witness from Cellmark who testified on behalf of the prosecution at trial. *Id.*

[118] Telephone interview with Kathy Brock, forensic serologist with the Mississippi Crime Lab. (Oct. 22, 1991); *see also Cellmark Diagnostics in Court*, Cellmark Diagnostics (1991) (promotional literature listing cases in which Cellmark has provided expert testimony).

[119] No. 9422 (Adams Co. Cir. Ct. 1991).

[120] No. 10458-V (Warren Co. Cir. Ct. 1990).

[121] No. 88-1/398 (Neshoba Co. Cir. Ct. 1989).

[122] *See supra* notes 2-4 and accompanying text.

cerned in order to make DNA fingerprinting as close to flawless as possible.

The statistical accuracy of DNA fingerprinting techniques, as touted by the commercial laboratories and the FBI, are all phenomenal.[123] While there is still room for error with any procedure whose accuracy is less than absolute, an accuracy of greater than ninety-five percent by Cetus, and ninety-nine percent and upwards by the other labs is remarkable. This is not flawless, but then again, will any procedure having the human factor involved ever be absolute?

According to James Starrs, professor of law and forensic sciences at George Washington University (and a consultant for Cellmark), DNA fingerprinting is a good deal more accurate than traditional blood, hair, and semen tests.[124] The advantages of DNA typing as viewed by Starrs are:

> (1) Traditional lab tests of blood specimens are impossible when they have dried and aged, while DNA molecules still can be detected in dried specimens.
> (2) Traditional semen testing relies on finding antigens in the semen which are protein materials found in blood. If a person is a "non-secretor" the test cannot be done. No antigens are required to perform a DNA test on semen.
> (3) The traditional HLA (human leukocyte antigen) blood test has an exclusion rating of only 90 to 95 percent (meaning when there is a match between specimens, there is a 90 or 95 percent certainty the specimens came from the same person) and, for some common blood types, the exclusion rating is as low as 50 percent.
> (4) Traditional hair testing only determines whether hair found at the crime scene has characteristics such as color and size that are consistent with those of the suspect.[125]

Another advantage is the ability to use DNA profiling to exonerate the innocent just as positively as identifying the guilty.[126] The accuracy and ability to identify specific persons by use of traditional forensic procedures pale in comparison with the capabilities of DNA fingerprinting. DNA fingerprinting will revolutionize the American system of

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[123] *Id.*

[124] Moss, *supra* note 12, at 66-67.

[125] *Id.*; *see also* Shines, *Blood Grouping and Genetic Marker Evidence: The Use of Electrophoretic Testing*, CRIM. L. BULL. 475, 489-90 (1988) (discussing advantages of DNA analysis).

[126] Moss, *supra* note 12, at 68.

criminal justice if it achieves the success that proponents predict for it.[127]

The use of DNA fingerprinting is not without its drawbacks.[128] A problem with DNA analysis of evidence is that the preservation of evidence samples from crime scenes is crucial. DNA degradation or contamination can occur to a point where it is impossible to obtain a DNA fingerprint.[129] Moisture and bacteria can cause DNA degradation; therefore, DNA samples must be adequately protected.[130] A lack of adequate protection for a DNA sample could result in a prosecutor not having a leg to stand on if his only DNA sample is destroyed.

A second major problem exists with interpretation of DNA analysis. Since all of the private labs and the FBI utilize their own respective DNA tests, there is no common standard by which to judge reliability. Each lab has its own statistical basis by which it judges accuracy of a match.[131] An invalid statistical population could be devastating. In a recent Texas case, a defendant was convicted of rape and murder and the death penalty imposed, based on DNA tests which found a one in ninety-six million probability that the match was a coincidence.[132] The analysis failed to take into account the fact that the crime occurred in a small inbred town founded by a handful of families, where, in such a homogeneous population, the possibility of a coincidental match is much greater.[133]

Lack of regulation is a major problem. "At present, forensic science is virtually unregulated with the paradoxical result that clinical laboratories must meet higher standards to diagnose strep throat than forensic labs must meet to put a defendant on death row."[134] The Of-

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[127] *See* Baird, *DNA Testing: Is Forensic DNA Testing Reliable? Yes: A Valuable Tool*, 76 A.B.A.J. 34, 34-35 (Sept. 1990) (director for paternity and forensic labs at Lifecodes praises reliability of DNA testing); Comment, *Admit It! DNA Fingerprinting is Reliable*, 26 HOUS. L. REV. 677, 677-706 (1989) (authored by Suzanne H. Stenson) (praising the reliability of DNA profiling); Tarantine, *Convicted by a Hair*, 4 CRIM. JUST. 5, 5-7, 41-43 (Summer 1989) (discussing accuracy and uses in court of DNA fingerprinting).

[128] Shines, *supra* note 125, at 490.

[129] Epstein, *supra* note 29, at 395. DNA fingerprinting is also impossible to perform if a sample is too small. Shines, *supra* note 125, at 490. With small or degraded samples, the PCR technique is preferred because it works on degraded material and requires a lesser amount of testing material than with the RFLP analysis. *Id.*

[130] Moss, *supra* note 12, at 67. DNA samples should be frozen, refrigerated, or air-dried. *Id.*

[131] Williams, *supra* note 36, at 30.

[132] Epstein, *supra* note 29, at 397.

[133] *Id.*

[134] Williams, *supra* note 36, at 30.

fice of Technological Assessment (OTA) has reported to Congress that, properly performed, DNA tests are reliable.[135] Identified as problems by the OTA were human error and improper monitoring of tests.[136] The OTA suggested such solutions as encouragement of voluntary efforts for minimum standards for laboratory performance, seeking uniform state practices, or enacting federal laws covering forensic labs.[137] The most pressing policy issue according to the OTA was the setting of minimum standards for forensic DNA testing.[138]

The need for standardization of genetic laboratories was studied prior to the release of the OTA report. Funded by the National Institute of Justice, the National Institute for Standards and Technology conducted a study to suggest internal DNA testing lab standards.[139] At the state level, the New York State Forensic DNA Analysis Panel recommended guidelines and standards be established for forensic DNA profiling and that DNA testing laboratories be accredited.[140] Also, a voluntary group of scientists from industry, forensic labs, and universities have formed the Technical Working Group on DNA Analysis Methods (TWGDAM) to suggest testing standards.[141] Such efforts by the various groups to help in setting laboratory standards confirm the realization by the legal and scientific communities that standardization is essential to a successful utilization of DNA fingerprinting in the American system of criminal justice. In keeping with this drive for standardization, in the spring of 1991, Cellmark introduced an International Quality Assessment scheme calling for quarterly proficiency testing of forensic laboratories engaged in DNA analysis.[142] This program is designed to meet OTA recommendations and TWGDAM guidelines, as well as proposed federal legislation entitled the "DNA Proficiency

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[135] OTA Report Brief, *Genetic Witness: Forensic Uses of DNA Tests*, Office of Technology Assessment (July 1990). An analytical arm of the U.S. Congress, the OTA's basic function is to help legislators anticipate and plan for the positive and negative impacts of technological changes. *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* The OTA also recommended that Congress discuss funding for forensic sciences, the advisability of a DNA databank, standardization for databanking, and privacy considerations in regard to DNA databanking. *Id.*

[139] Note, *supra* note 13, at 815.

[140] Gordon, *DNA Identification Tests - On the Way Toward Judicial Acceptance*, 6 J. SUFFOLK ACAD. L. 39, 41 (1989).

[141] Shoop, *Is DNA Ready for Trial?*, 26 TRIAL 11 (1990).

[142] Cellmark Diagnostics, *Cellmark Digest: The DNA News Source*, Cellmark (Spring 1991).

Testing Act of 1991."[143]

A successful implementation of regulatory standards to ensure accuracy and reliability is essential for the criminal justice system to reap the full benefits of such a powerful tool as DNA fingerprinting.

CONCLUSION

DNA fingerprinting is a powerful tool that is revolutionizing forensic science. If science fulfills the promise that many believe it holds, then the truth-seeking process of the American criminal justice system will be furthered as it has never been before. In the words of FBI director William Sessions, "Cooperation [among scientists, law enforcement managers, and prosecutors] is the key. . . ."[144] The establishment of standards and procedures to enhance reliability will ensure that DNA fingerprinting provides the greatest truth-seeking device that forensic science has ever seen.

Lee Thaggard

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[143] *Id.*

[144] Sessions, *Federal Bureau of Investigation Editorial* 34 J. FORENSIC SCI. 1051, 1054 (1989).

RECENT DECISIONS

Constitutional Law—Harmless Error—Admission of Coerced Confession Constitutional Error Subject To Harmless Error Analysis*

Petitioner[1] prosecuted respondent[2] in the Superior Court of Maricopa County, Arizona, for the first degree murder of respondent's stepdaughter.[3] Respondent motioned to suppress[4] from evidence two confessions made to a government informant.[5] Respondent contended that

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* Best Casenote Award. Presented by the law firm of Ott, Purdy and Scott of Jackson, Mississippi.

[1] Petitioner was the State of Arizona. Arizona v. Fulminante, 111 S. Ct. 1246, 1246 (1991).

[2] *Fulminante*, 111 S. Ct. at 1250. Respondent was Fulminante. *Id.*

[3] *Id.* On September 12, 1982, Fulminante reported his eleven-year-old stepdaughter missing. *Id.* Investigators discovered her decomposed body two days later. *Id.* She had two gunshot wounds to the head. *Id.* Fulminante became a suspect in the death, but the state did not indict him until September 4, 1984. *Id.*

[4] *Id.* at 1250-51. Before the trial began, the trial court held a hearing to rule on the admissibility of certain evidence. *Id.* During that hearing, Fulminante objected to the court allowing into evidence confessions he made to a government informant while in prison. *Id.*

[5] *Id.* Following the girl's death, the State of New York incarcerated Fulminante for another crime. *Id.* While in the New York prison, Fulminante began to receive threatening treatment after a rumor spread among other inmates that he was a suspected child killer. *Id.* Fulminante befriended Sarivola who, unknown to Fulminante, was a paid informant for the Federal Bureau of Investigation. *Id.* Sarivola offered Fulminante protection in exchange for the truth about the murder, and Fulminante confessed. *Id.* Sarivola reported this information to the FBI and, upon expiration of his sentence, left prison. *Id.* After Fulminante's release from prison, he met with Sarivola and Sarivola's fiancee', where he allegedly confessed to the murder again. *Id.*

the confessions were involuntary,[6] and the court should exclude them from evidence.[7] The trial court found the confessions to be voluntary[8] and denied respondent's motion.[9] The jury convicted respondent and subsequently sentenced him to death.[10] The Arizona Supreme Court reversed and remanded, ruling that respondent confessed involuntarily.[11] On writ of certiorari, the United States Supreme Court, *held*, affirmed.[12] Where the prosecution obtained a conviction based on a coerced confession, the appellate court must apply harmless error analysis and uphold the conviction if the court deems the confession harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991).

The history of harmless error as it relates to constitutional errors,[13] such as coerced confessions,[14] began in the early English Court

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[6] *Id.* at 1251. Fulminante contended that he made the confession to Sarivola involuntarily in order to receive Sarivola's protection while in prison. *Id.*

[7] *Fulminante*, 111 S. Ct. at 1251. Fulminante argued that the coerced confessions violated his constitutional rights under the fifth and sixth amendments to the United States Constitution. *Id.*

[8] *Id.* Based upon its review of the record, the trial court found that the confessions made by Fulminante were voluntary. *Id.*

[9] *Id.* Since the trial court determined the confessions to Sarivola, and later to his fiancee', to be voluntary, their admission into evidence would not be a violation of Fulminante's constitutional right against self incrimination or to due process of law. *Id.* The trial court therefore denied Fulminante's motion to suppress the confessions. *Id.*

[10] *Id.* The trial court convicted Fulminante for the murder of his stepdaughter on December 19, 1985, and sentenced him to death. *Id.*

[11] *Id.* On its initial review, the Arizona Supreme Court determined that Sarivola coerced the confession made to him; however, the court held the confession made to his fiancee' was voluntary. *Id.* The Arizona Supreme Court decided that the confession made to Sarivola's fiancee' was enough evidence to convict Fulminante, and affirmed his conviction. *Id.* at 1258. However, upon a motion of reconsideration, the Arizona Supreme Court decided that, based on prior United States Supreme Court cases, coerced confessions were harmful per se and required automatic reversal. *Id.* at 1251.

[12] *Fulminante*, 111 S. Ct. at 1251. Although the United States Supreme Court affirmed the decision of the Arizona Supreme Court, it did so for reasons other than those used by the Arizona Supreme Court. *Id.* The United States Supreme Court's opinion was split, with Justice White writing part of the majority opinion and dissenting in part, and Chief Justice Rehnquist writing the other part of the majority opinion and dissenting in part. *Id.* at 1250, 1261. The United States Supreme Court conducted a harmless error analysis and determined, as a matter of law, that Fulminante's confession was harmful. *Id.* at 1257-61, 1263-66. The Court then affirmed the Arizona Supreme Court's decision because of the harmful effect the admission of the confession had on Fulminante's case. *Id.* at 1261.

[13] Mause, *Harmless Constitutional Error: The Implications of* Chapman v. California, 53 MINN. L. REV. 519, 519-21 (1969). A constitutional error was an error that denied or violated the defendant's constitutional rights during trial. *Id.* Though constitutional

of Exchequer in the case of *Crease v. Barrett*.[15] In *Crease*, the court ruled that an error that occurred over the course of a trial carried a presumption of prejudice.[16] The English courts[17] reasoned that the presumed prejudice rule required an automatic reversal on appeal of decisions in which the trial court committed any type of error.[18] The increase in reversals backlogged the court system[19] and prompted adoption of a harmless error rule for immaterial errors.[20] American courts adopted the presumed prejudice ruling of the Court of Exchequer, and encountered the same backlog problems that the courts of England had experienced.[21] As a result, federal and state legislatures enacted harmless error statutes.[22] Most federal and state courts, however, only applied the harmless error statutes to ordinary trial errors and not to errors that violated the United States Constitution.[23] The

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violations could occur during civil trials, they were usually only thought of in criminal cases. *Id.*

[14] Bram v. United States, 168 U.S. 532, 542-44 (1897). The Court ruled that a coerced or involuntary confession violated the fifth amendment to the United States Constitution as "no person shall be compelled in a criminal case to be a witness against himself." *Id.*

[15] 149 Eng. Rep. 1353 (Ex. 1835).

[16] *Crease*, 149 Eng. Rep. at 1359. Prior to *Crease*, the appellate courts would not reverse a decision of the lower court unless it appeared to the judge that the truth had not been reached. 1 J. WIGMORE, EVIDENCE § 21 (Tillers rev. 1983). This presumed prejudice rule became known as the "Exchequer Rule." *Id.*

[17] J. WIGMORE, *supra* note 16, § 21. The Exchequer Rule became a part of England's common law for the review of trial error. *Id.*

[18] R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 7-8 (1970). Most courts interpreted the presumed prejudice rule to mean that the defeated party received a new trial for any error in ruling that occurred in the trial court. *Id.*

[19] Campbell, *Economic View of Developments in the Harmless Error and Exclusionary Rule*, 42 BAYLOR L. REV. 499, 505-06 (1990). The lower courts had to re-try each case that the appellate courts reversed. *Id.*

[20] R. TRAYNOR, *supra* note 18, at 8. Parliament became involved and enacted the Judicature Act of 1873. *Id.* Under this act, when the trial court committed an error, an appellate court would order reversal when, in "the opinion of the Court to which application is made, some substantial wrong or miscarriage has been thereby occasioned on the trial." *Id.* at 9.

[21] J. WIGMORE, *supra* note 16, § 21 n.17. Most jurisdictions followed the Rule of Exchequer and reversed decisions for very trivial errors. *Id.*

[22] 28 U.S.C. § 2111 (1988). This statute, which was enacted on May 24, 1949, states "[O]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regards to errors or defects which do not affect the substantial rights of the parties." *Id.*; *see also* Hebert, *The Problem of Reversible Error in Louisiana*, 6 TUL. L. REV. 169, 171-72 n.13 (1932) (listing of state's harmless error statutes).

[23] Mause, *supra* note 13, at 520. Courts contended that constitutional errors were of

courts considered constitutional errors, including coerced confessions,[24] to be harmful per se and to require automatic reversal.[25]

The United States Supreme Court first suggested that harmless error statutes extended to constitutional errors in *Fahy v. Connecticut*.[26] In *Fahy*, the respondent[27] argued that even though the trial court committed a constitutional error,[28] the United States Supreme Court should affirm the petitioner's[29] conviction because the error was harmless.[30] The United States Supreme Court disagreed and found the error of the trial court harmful to the petitioner.[31] The *Fahy* Court failed to address the propriety of the application of harmless error

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such great importance that a finding of harmless error was improper. *Id.* Most early constitutional error cases reversed convictions without a discussion of harmless error. *Id.*; *see* Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967) (defendant was denied speedy trial, and Court held this to be harmful error); Haynes v. Washington, 373 U.S. 503, 518-19 (1963) (coerced confession that violated fifth amendment was harmful per se); Stromberg v. California, 283 U.S. 359, 369-70 (1931) (conviction based on unconstitutional statute required automatic reversal).

[24] Payne v. Arkansas, 356 U.S. 560, 567-68 (1958). The Court stated that it was impossible to determine the amount of weight a jury gave to a confession. *Id.* Because of the damaging effect of a confession, most appellate courts overturned convictions when the trial court admitted a coerced confession, even if the appellate court deemed other evidence sufficient for the conviction. *Id.*; *see, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 537 (1963) (coerced confession does not meet demands of due process of law); Rogers v. Richmond, 365 U.S. 534, 540 (1961) (coerced confession violates fourteenth amendment, and conviction cannot stand); Brown v. Mississippi, 297 U.S. 278, 287 (1936) (confession obtained by torture was void under due process clause of fourteenth amendment).

[25] Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). The *Kotteakos* Court held that harmless error rules might be inapplicable when dealing with a constitutional error or a command from Congress. *Id.*

[26] 375 U.S. 85 (1963).

[27] *Fahy*, 375 U.S. at 85. The respondent was the State of Connecticut. *Id.* During the prosecution of the petitioner for painting swastikas on a Jewish synagogue, the respondent used evidence obtained without a search warrant. *Id.* at 87. The trial court admitted the evidence, and the jury found petitioner guilty. *Id.* at 85.

[28] *Id.* at 86. The Court ruled in Mapp v. Ohio, 367 U.S. 643 (1961), that evidence obtained without a search warrant was illegal and violated the fourth amendment to the United States Constitution. *Mapp*, 367 U.S. at 649. The Court excluded any evidence obtained through such a search. *Id.*

[29] *Fahy*, 375 U.S. at 85. The petitioner, Fahy, argued that the search was illegal and therefore violated his fourth amendment right against illegal search and seizure. *Id.* at 87. Fahy claimed that the constitutional violation required automatic reversal. *Id.* at 86.

[30] *Id.* The Connecticut Supreme Court applied the state's harmless error statute, which required a reversal only if the error materially injured the appellant. *Id.* The Connecticut Supreme Court found that Fahy suffered no material injury and affirmed the trial court's decision. *Id.*

[31] *Id.* at 87-92. The United States Supreme Court applied a harmless error analysis and found the admission of the illegally seized evidence harmful to petitioner. *Id.*

analysis to constitutional errors in all cases, but merely found the error harmful in this particular case.[32] The Court ruled that in order for a reviewing court to find a constitutional error harmless, there must be no reasonable possibility that the error contributed to the petitioner's conviction.[33] The Court applied harmless error analysis to the particular situation in *Fahy*;[34] however, the Court failed to address two issues: 1) whether harmless error statutes covered every constitutional error and 2) whether state courts should apply a federal harmless error rule or the state rule when dealing with a constitutional error.[35]

The United States Supreme Court established its position on these issues in *Chapman v. California*.[36] In *Chapman*, the Court held that harmless error statutes did govern the respondent's violation of the petitioner's fifth amendment rights.[37] The Court further found the error

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[32] *Id.* at 86. The issue in *Fahy* was whether a state court's application of harmless error rules to illegally seized evidence, a constitutional error, was proper. *Id.* The *Fahy* Court, however, avoided the issue in general and decided only that the error was harmful in this particular case. *Id.* The Court stated that "[o]n the facts of this case, it is not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error' under the federal standard of what constitutes harmless error." *Id.*; *see generally* Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83, 86-87 (1967) (discussion of history of harmless constitutional error and its application by courts).

[33] *Fahy*, 375 U.S. at 86. The Court failed to distinguish whether it based its decision on the error being subject to state or federal statutes. *Id.*; *see also* Mause, *supra* note 13, at 522-23 (discussion of effects of *Fahy* decision).

[34] *Fahy*, 375 U.S. at 86. The *Fahy* Court did not specify that harmless error analysis applied to all constitutional errors; however, the Court did apply harmless error to the particular facts in *Fahy* to reach its decision. *Id.*; *see* Note, *Prosecutorial Misconduct Cannot Be Connected By The Supervisory Powers of The Federal Courts When The Error Is Subject to Examination Under the Harmless Error Doctrine*: United States v. Hastings, 27 How. L.J. 1057, 1063 (1984) (acknowledging that while other United States Supreme Court cases discussed harmless error in relation to constitutional error, *Fahy* Court developed first test for its application); *cf.* United Bhd. of Carpenters v. United States, 330 U.S. 395, 408-09 (1947) (even though strong evidence existed against defendant for conspiracy, Court would not find improper jury instructions harmless); Bollenbach v. United States, 326 U.S. 607, 614 (1946) (Court denied prosecution's argument that improper jury instructions were harmless); *Bram*, 168 U.S. at 541 (admission of involuntary confession resulted in reversible error).

[35] Campbell, *supra* note 19, at 506-07. The Court left these questions unanswered by way of its narrowly worded opinion. *Id.* State courts remained unsure of how to address a constitutional error. *Id.*

[36] 386 U.S. 18 (1967).

[37] *Chapman*, 386 U.S. at 19-20. Chapman chose not to testify at her murder trial. *Id.* The prosecutor made numerous references about her silence, references that inferred guilt. *Id.* In a case decided after Chapman's trial but before her appeal, the United States Supreme Court ruled that such statements were a violation of a defendant's fifth

harmful based on a harmless error analysis.[38] The *Chapman* Court's decision made three very important rulings on harmless error application as it relates to constitutional errors.[39] The first ruling determined that any constitutional error that occurs in a state court is subject to federal, not state, harmless error laws.[40] The second ruling determined that automatic reversal should not apply to every constitutional error "because there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the . . . Constitution, be deemed harmless."[41] The Court in *Chapman* stated that past decisions had indicated that some constitutional rights were so basic to a fair trial that the Court could not treat their infraction as harmless error.[42] However, the Court left unclear whether these rights were to remain harmful per se or if they were subject to harmless error analysis.[43] The third ruling established

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amendment rights. *Id.*; *see* Griffin v. California, 380 U.S. 609, 612-13 (1965) (declared California's constitutional provision that allowed prosecutors to comment on defendant's silence during trial unconstitutional).

[38] *Chapman*, 386 U.S. at 22-26. The Court applied the test it adopted for harmless error and found that the comments harmed the petitioner. *Id.*

[39] *Id.* at 21-24. The Court made these rulings in order to determine the proper result in *Chapman*. *Id.* at 20; *see also* Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 82-86 (1988) (discussions of *Chapman* and its aftermath); Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing*, 54 U. CHI. L. REV. 741, 741-43 (1987) (historical significance of *Chapman* decision).

[40] *Chapman*, 386 U.S. at 21. The Court's ruling required states to apply the federal harmless error rule even in state court. *Id.* In its opinion, the Court contended that the federal court was the guardian of constitutional rights. *Id.* The Court stated that "[w]hether a conviction for a crime should stand when a state has failed to afford federal constitutionally guaranteed rights is . . . a federal question." *Id.*

[41] *Id.* at 22. The Court based this ruling on the federal statute for harmless error. *Id.* Since this ruling, the Court has applied harmless error analysis to a wide range of constitutional errors. Stacy & Dayton, *supra* note 39, at 84; *see* Crane v. Kentucky, 476 U.S. 683, 687, 691 (1986) (trial court's violation of fourteenth amendment by excluding circumstances of confession was subject to harmless error analysis); Rushen v. Spain, 464 U.S. 114, 118-19 (1983) (ex parte communication between trial judge and state held harmless); Kentucky v. Whorton, 441 U.S. 786, 790 (1979) (jury instructions which lacked presumption of accused's innocence held harmless).

[42] *Chapman*, 386 U.S. at 23. The Court cited three examples of constitutional rights that in the past required automatic reversal. *Id.*; *see* Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (trial court violated defendant's fourteenth amendment rights by denying counsel throughout proceedings); *Payne*, 356 U.S. at 561 (erroneous admission of coerced confession violated defendant's fourteenth amendment rights); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (trial before pretrial judge violated defendant's fourteenth amendment rights).

[43] *Chapman*, 386 U.S. at 23. In stating that these cases required automatic reversal in the past, it was unclear if the Court meant these types of errors always required auto-

that a federal harmless error rule applied to constitutional errors, and the error must be proved harmless beyond all reasonable doubt.[44] The *Chapman* Court did not develop its own rule, but instead adopted the strict rule from *Fahy* that the error could not contribute to the conviction.[45]

The application of this strict rule indicated the Court's reluctance to affirm a decision where the trial court committed a constitutional error.[46] In *Harrington v. California*,[47] the Court moved toward a less strict application and rule for harmless constitutional error.[48] *Harrington* applied harmless error analysis to the admission of a confession of

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matic reversal, or if it was changing the rule, or that they were now subject to harmless error analysis. *Id.*; *see* Mause, *supra* note 13, at 525-26 (discussion of uncertainty surrounding *Chapman* decision); Black, *The Supreme Court, 1966 Term - Forward: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 208 (1967) (discussion of *Chapman* and its impact on harmless error).

[44] *Chapman*, 386 U.S. at 23-24. After the Court determined that constitutional errors could be harmless pursuant to the federal harmless error statute, it developed a rule to determine the harmlessness of an error. *Id.*; *see* Satterwhite v. Texas, 486 U.S. 249, 257-59 (1988) (Court applied *Chapman* rule and found error harmless); *cf.* Connecticut v. Johnson, 460 U.S. 73, 81-82, 88 (1983) (jury instructions stating defendant's presumed intent was harmful under the *Chapman* rule); Mincey v. Arizona, 437 U.S. 385, 398 (1978) (Court applied *Chapman* rule and found error was not harmless).

[45] *Chapman*, 386 U.S. at 24. The Court recognized the need for developing a rule to adhere to the federal statute's goal of protecting the substantial rights of the parties. *Id.* The Court stated the rule developed in *Fahy* accomplished that goal. *Id.* at 23.

[46] R. TRAYNOR, *supra* note 18, at 43. The rule developed by the Court in *Fahy* and affirmed in *Chapman* basically required automatic reversal in all circumstances. *Id.*

[47] 395 U.S. 250 (1969).

[48] *Harrington*, 395 U.S. at 251-52. The Court determined that denial of the defendant's sixth amendment right to confrontation of his accuser was within the harmless error statute. *Id.* The Court then applied its harmless error rule to conclude that the error was harmless. *Id.* at 254. The United States Supreme Court faced this same issue in an earlier case. *Id.* at 252; *see* Bruton v. United States, 391 U.S. 123, 127 (1968) (one co-defendant's confession used to implicate another co-defendant). In *Bruton* the Court reversed the conviction based on constitutional error. *Bruton*, 391 U.S. at 137. The *Bruton* Court did not apply harmless error analysis even though the *Chapman* Court ruled, one year earlier, that constitutional errors could be harmless. *Chapman*, 386 U.S. at 23. The Court in *Bruton* indicated that such an error required automatic reversal in every case. *Bruton*, 391 U.S. at 134. However, the application of harmless error analysis in *Harrington* suggested the United States Supreme Court's willingness to apply harmless error in most constitutional error cases. *Harrington*, 395 U.S. at 252; *see also* Moore v. Illinois, 434 U.S. 220, 227, 232 (1977) (violation of defendant's sixth amendment rights was subject to harmless error analysis); Brown v. United States, 411 U.S. 223, 231-32 (1973) (improperly admitted testimony of another was harmless); Coleman v. Alabama, 399 U.S. 1, 11 (1970) (denial of counsel which violated sixth amendment was subject to harmless error analysis).

one co-defendant which also implicated the petitioner,[49] another co-defendant, in violation of his sixth amendment rights.[50] The United States Supreme Court concluded that even though the error involved the confession of a co-defendant which denied the petitioner confrontation through cross-examination, it did not merit automatic reversal.[51] The *Harrington* Court also modified the harmless error rule adopted by *Chapman*.[52] The *Harrington* test used was whether other cumulative evidence, which proved the same facts shown by the evidence admitted in error, overwhelmingly supported the conviction.[53]

The case of *Milton v. Wainwright*[54] further modified the overwhelming evidence test developed in *Harrington*,[55] demonstrating the

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[49] *Harrington*, 395 U.S. at 250. The petitioner was Harrington. *Id.* The trial court convicted him and three others of murder and attempted robbery. *Id.* The state tried the four men in a single trial. *Id.* Petitioner's co-defendants confessed to the crime, and the prosecution introduced their confessions at trial. *Id.* Two of the three co-defendants who confessed did not testify at trial, denying petitioner an opportunity to cross-examine them. *Id.*

[50] *Id.* The petitioner argued that since he was not afforded an opportunity to cross-examine the two witnesses, the trial court denied him his right to confrontation guaranteed by the sixth amendment to the United States Constitution. *Id.*

[51] *Id.* at 254-55. The Court agreed that the two confessions violated petitioner's sixth amendment rights; however, the Court concluded that harmless error analysis applied to this type of constitutional error. *Id.*

[52] *Id.* at 254. The Court stated that it could not look into the minds of the jury to determine whether the confessions of the two co-defendants impacted on the jury's decision. *Id.* Because the Court could not determine the impact on the jury, it looked to other overwhelming evidence to make its decision. *Id.*

[53] *Id.* The Court based its decision on two factors. *Id.* First, the two confessions did nothing more than provide cumulative duplicative evidence that the prosecution obtained from a third co-defendant's confession. *Id.* Since the petitioner cross-examined the third co-defendant, then the third co-defendant's confession was proper and admissible. *Id.* Second, other evidence, excluding the confessions, was so overwhelming that the conviction should stand. *Id.* While these factors varied from the *Chapman* test, the Court stated its decision did not depart from or dilute *Chapman*. *Harrington*, 395 U.S. at 254. However, Justice Brennan's dissent stated that the majority overruled *Chapman* with this decision. *Harrington*, 395 U.S. at 255 (Brennan, J., dissenting). The dissent contended that the Court shifted the inquiry from whether the error had contributed to the evidence to whether the untainted evidence provided overwhelming support for the conviction. *Id.* (Brennan, J., dissenting).

[54] 407 U.S. 381 (1972).

[55] *Milton*, 407 U.S. at 377. The Court based its decision to support the conviction on whether the untainted evidence was overwhelming, and not on whether other evidence duplicated the questioned evidence. *Id.* The *Milton* Court's rule was based strictly on overwhelming evidence that existed to justify the conviction. *Id.* While this case added a third test in the United States Supreme Court's approach to determining if a constitutional error was harmless, the Court had not overruled either of the other two tests, making each test still applicable depending upon the circumstances. Comment, *Harmless*

Court's willingness to find constitutional errors harmless by a lesser standard.[56] In *Milton*, the petitioner made a confession to a police officer posing as his cellmate.[57] The petitioner argued that the use of this confession at trial violated his fifth amendment right against self-incrimination and his sixth amendment right to have counsel present during questioning.[58] The United States Supreme Court agreed that the lower court erred in admitting the confession into evidence, but concluded that other evidence, excluding the confession, justified the conviction.[59] The Court abandoned the cumulative duplicative evidence requirement of *Harrington* and based its decision strictly on other overwhelming evidence to support the conviction.[60] The *Milton* Court ruled that the admission of the confession was harmless without considering the type of constitutional error which had occurred.[61]

Constitutional Error: An Analysis of Its Current Application, 33 BAYLOR L. REV. 961, 961-62 (1981).

[56] Campbell, *supra* note 19, at 509-10. The Court's view of harmless error in the context of constitutional errors evolved to allow more types of errors to be subject to a harmless error analysis. *Id.* The Court found these errors to be harmless in many situations. *Id.*; *see also* Rose v. Clark, 478 U.S. 570, 578-79 (1986) (harmless error rule was presumed to be appropriate for virtually every kind of constitutional error); United States v. Hasting, 461 U.S. 499, 509 (1983) (reviewing courts ignored errors which were harmless, including most constitutional errors).

[57] *Milton*, 407 U.S. at 373-75. The police officer entered the petitioner's cell posing as another inmate. *Id.* The officer gained the petitioner's confidence, and the petitioner confessed his crime. *Id.* The officer later testified against the petitioner during trial. *Id.*

[58] *Id.* The petitioner confessed to the crime three times before the police charged him. *Id.* After his arrest, the petitioner obtained counsel who advised him not to talk to anyone about his case. *Id.* The petitioner claimed that the statements made to the police officer were involuntary, thus violating his fifth amendment rights. *Id.* The petitioner also claimed that once he obtained counsel, the police could not question him without his counsel being present. *Id.*; *see* Massiah v. United States, 377 U.S. 201, 205-06 (1964) (accused has right to counsel during interrogation).

[59] *Milton*, 407 U.S. at 377. The Court ruled that the three confessions made by the petitioner prior to his obtaining counsel were so overwhelmingly supportive of the conviction that the confession to the police officer in his cell was harmless. *Id.*

[60] *Id.* at 373-77. The Court based its decision on overwhelming, untainted evidence to support the conviction, without consideration to whether cumulative, duplicative evidence existed. *Id.*

[61] *Id.* at 372. The Court stated, "Assuming, *arguendo*, that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt." *Id.* The Court's silence as to automatic reversal when a confession such as this took place indicated the Court's openness toward allowing coerced confessions to be harmless error. Stacy & Dayton, *supra* note 39, at 101-03. Some courts viewed the *Milton* decision as ruling that coerced confessions were now subject to harmless error analysis. *Id.*; *see* United States v. Murphy, 763 F.2d 202, 208-11 (6th Cir. 1985) (involuntary confession admitted in error; however, Court ruled admis-

Delaware v. Van Arsdall[62] exemplified the United States Supreme Court's willingness to apply harmless error analysis to a growing number of constitutional errors.[63] In *Van Arsdall* the Court stated the *Chapman* decision stood for the premise that certain constitutional errors could be harmless as to the "terms of their effect on the fact finding process at trial."[64] The Court stated the central theme of the trial was to determine factual questions of the defendant's guilt or innocence, focusing on the overall fairness of the trial and not on the presence of immaterial error.[65] Further, the Court affirmed that two constitutional errors, the denial of counsel and a non-impartial judge, always required automatic reversal notwithstanding the facts of the case; however, coerced confessions were not deemed to mandate strict automatic reversal.[66] Unlike *Chapman*, in which the Court classified coerced confessions as requiring automatic reversal, the *Van Arsdall* Court indicated that a coerced confession could be harmless depending on the specific facts of the case.[67]

In the instant case, the United States Supreme Court determined that since it differentiated constitutional errors into categories of "trial errors"[68] and "structural defects in the constitution of the trial mecha-

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sion was harmless), *cert denied*, 474 U.S. 1063 (1986); Harrison v. Owen, 682 F.2d 138, 140-42 (7th Cir. 1982) (since United States Supreme Court never established harmful per se rule for coerced confessions, then harmless error applied); State v. Castaneda, 150 Ariz. 383, 387, 724 P.2d 1, 6 (1986) (overwhelming evidence made coerced confession harmless).

[62] 475 U.S. 673 (1986).

[63] *Van Arsdall*, 475 U.S. at 681. The Court reiterated its contention that "the Constitution entitles a criminal defendant to a fair trial not a perfect one." *Id.*

[64] *Id.* By emphasizing the fact-finding process, the Court separated constitutional errors into those which were a part of the fact-finding process and those which were not. *Id.* If the trial court made an error as part of the fact-finding process, the United States Supreme Court considered it subject to harmless error analysis. *Id.*

[65] *Id.* at 681. The Court stated that any errors which related to the facts of the trial were not of such magnitude as to require automatic reversal. *Id.* The Court considered that only those errors which were pervasive throughout the trial process, regardless of the facts, required automatic reversal. *Id.*

[66] *Id.* at 682. The Court identified two constitutional errors that the majority considered pervasive throughout the trial process regardless of the facts. *Id.* These errors, denial of counsel and a non-impartial judge, were two of the three errors identified by the Court in its opinion in *Chapman* as being errors requiring automatic reversal. *Chapman*, 386 U.S. at 23 n.17. The other error identified by the *Chapman* Court was a coerced confession. *Chapman*, 386 U.S. at 23 n.17.

[67] *Van Arsdall*, 475 U.S. at 682. The majority failed to include coerced confessions as a type of error that required automatic reversal. *Id.*

[68] Arizona v. Fulminante, 111 S. Ct. 1246, 1264 (1991). The Court defined trial errors as "error[s] which occurred during the presentation of the case to the jury, and

nism,"[69] a harmless error analysis was applicable to all constitutional errors which the Court categorized as trial errors.[70] The Court concluded that since the admission of a coerced confession at trial was a constitutional error that fell into the category of classic trial errors,[71] such an admission was subject to a harmless error analysis.[72] As to particular facts of the case, the United States Supreme Court applied a harmless error analysis and found that since respondent's confessions harmed him at trial,[73] the trial court's conviction was improper and respondent should receive a new trial.[74]

In a dissenting opinion,[75] Justice White[76] argued that since past

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which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.*

[69] *Id.* at 1265. The Court considered pervasive errors that affected the entire trial process as "[s]tructural defects in the constitution of the trial mechanism." *Id.* The Court determined that constitutional errors that fit into this category were not subject to harmless error analysis. *Id.*

[70] *Id.* at 1264. The Court's majority opinion on whether it could apply a harmless error analysis to a constitutional error depended on if the constitutional error was a trial error. *Id.* The Court gave numerous examples of trial errors to which it applied harmless error. *Id.* at 1263; *see, e.g.*, Clemons v. Mississippi, 494 U.S. 738, 740 (1990), 110 S. Ct. 1441, 1450 (1990) (overbroad jury instructions during sentencing stage of trial); Carella v. California, 491 U.S. 263, 266-67 (1989) (erroneous conclusive presumption in jury instructions); Chambers v. Maroney, 399 U.S. 42, 52-53 (1970) (admission of evidence found in search of home in violation of fourth amendment was "harmless beyond reasonable doubt").

[71] *Fulminante*, 111 S. Ct. at 1263-65. The Court not only defined and listed examples to support its conclusion that the admission of a coerced confession was a trial error, it also contrasted and differentiated admission of a coerced confession from a structural defect in the constitution of the trial mechanism. *Id.* at 1264-65.

[72] *Id.* at 1264-66. The Court held that the admission of a coerced confession did not require automatic reversal. *Id.* The Court concluded that it could quantify and weigh the effect of a coerced confession against other evidence to determine if the confession changed the trial's outcome. *Id.* at 1264. Consequently, a verdict could be sustained if there was other adequate evidence apart from the coerced confession, which supported the verdict. *Id.*

[73] *Id.* at 1258-60. The Court reevaluated the trial court record and determined the other evidence against Fulminante inadequate to prove the admission of the confession was harmless beyond a reasonable doubt. *Id.*

[74] *Id.* at 1258-61. The Court concluded that the admission of a coerced confession was subject to a harmless error analysis. *Id.* at 1265. The Court applied such an analysis to determine whether the admission of Fulminante's confession at trial was harmless. *Id.* at 1261.

[75] *Id.* at 1253 (White, J., dissenting). The dissent objected to the majority applying a harmless error analysis to the admission of a coerced confession. *Id.* (White, J., dissenting). The dissent contended this was the type of constitutional error the Court should always consider harmful. *Id.* (White, J., dissenting).

cases supported the view that the Court always considered a coerced confession harmful error, the Court had precedent which established that the admission of a coerced confession was not subject to a harmless error analysis.[77] Justice White's dissent contended that since a coerced confession was so fundamentally damaging[78] to the accused, the Court should treat it as harmful per se and require automatic reversal.[79] The dissent further reasoned that since it was often difficult to differentiate between a trial error and a "structural defect in the constitution of the trial mechanism,"[80] which supported the basis for the majority's opinion, this distinction was improper for determining the applicability of harmless error analysis.[81]

In another dissenting opinion, Chief Justice Rehnquist[82] con-

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[76] *Fulminante*, 111 S. Ct. at 1253 (White, J., dissenting). Justice White wrote a dissenting opinion in which Justices Blackmun, Marshall, and Stevens joined. *Id.* (White, J., dissenting).

[77] *Id.* at 1253-57 (White, J., dissenting). Justice White's dissent discussed the prior cases dealing with the admission of a coerced confession, and concluded that precedent required such an admission always be harmful error. *Id.* at 1253 (White, J., dissenting). The dissent argued the majority had overturned this precedent in a violation of stare decisis. *Id.* at 1257 (White, J., dissenting).

[78] *Id.* at 1255 (White, J., dissenting). Justice White's dissent considered a confession "probably the most probative and damaging evidence that can be admitted against [an accused]." *Id.* (White, J., dissenting). The dissent argued that there was no way to determine the amount of weight a jury gave to a confession. *Id.* (White, J., dissenting). The dissent contended that the Court could not expect a jury to ignore a confession even if instructed to do so. *Id.* (White, J., dissenting).

[79] *Id.* at 1255-56 (White, J., dissenting). Justice White's dissent reasoned that because of the damaging effect a confession carries, if the trial court admitted a coerced confession in error, the appellate court should reverse automatically. *Id.* at 1257 (White, J., dissenting). The dissent contended that prior Court decisions had laid this as clear precedent. *Id.* (White, J., dissenting).

[80] *Id.* at 1254-55 (White, J., dissenting). Justice White argued the Court could not easily categorize constitutional errors into trial errors and structural defects in the constitution of the trial mechanism. *Id.* at 1255 (White, J., dissenting). As an example, the dissent stated that not instructing a jury on the presumption of innocence was not subject to harmful error analysis, while not instructing a jury on reasonable doubt was subject to harmful error analysis. *Id.* (White, J., dissenting). While these errors yielded separate results, the dissent was unsure into which category each fell. *Id.* (White, J., dissenting).

[81] *Fulminante*, 111 S. Ct. at 1254-55 (White, J., dissenting). Justice White's dissent contended that because of the difficulty in making a distinction between types of errors, this basis as the majority's opinion failed as a jurisprudence for determining harmful error. *Id.* (White, J., dissenting).

[82] *Id.* at 1261-63 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist, joined by Justice O'Connor, and partially joined by Justices Kennedy, Souter, and Scalia, wrote a dissenting opinion. *Id.* (Rehnquist, C.J., dissenting).

tended that since respondent made the confessions voluntarily, the trial court properly admitted the confessions into evidence and there was no need to consider harmless error.[83] However, because the majority position found that the government informant coerced respondent's confession, Chief Justice Rehnquist applied a harmless error analysis and found that since there was other evidence to support the conviction, the confessions were harmless.[84]

The United States Supreme Court's decision in *Fulminante* overrules clear precedent in its application of harmless error analysis to a coerced confession.[85] The majority appeared to rule by default rather than follow precedent of the Court.[86] In abandoning this precedent, the majority reasoned that since all trial errors are subject to harmless error analysis and since a coerced confession is a trial error, then it too should be subject to harmless error analysis.[87] This appears to be a questionable form of reasoning concerning harmless error.[88] As Justice White's dissent points out, the Court cannot categorize every constitutional error as either a trial error or not.[89] This will cause uncertainty in the application of harmless error analysis to future constitutional violations.[90] Also, in developing this approach to determine when to apply harmless error, the majority ignores precedent which established that a coerced confession violates basic constitutional rights.[91] The

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[83] *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's dissent disagreed with the majority concerning the facts of the case. *Id.* (Rehnquist, C.J., dissenting). Rehnquist argued that, based upon the trial court record, there was no coercion involved. *Id.* at 1262 (Rehnquist, C.J., dissenting). The Rehnquist dissent relied upon the fact that at trial, Fulminante stipulated to the fact that "[a]t no time did [he] indicate he was in fear of other inmates nor did he ever seek the [government informant's] 'protection.'" *Id.* (Rehnquist, C.J., dissenting). Rehnquist reasoned that since the respondent acted without coercion, his fifth amendment rights were not violated, and the trial court acted properly by admitting the confessions into evidence. *Id.* (Rehnquist, C.J., dissenting).

[84] *Id.* at 1266 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's dissent agreed with the majority position that harmless error analysis applied to coerced confessions. *Id.* at 1264 (Rehnquist, C.J., dissenting). However, Rehnquist disagreed with the majority opinion's result upon applying the analysis. *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's dissent reasoned that since other evidence existed which was enough to convict the respondent, the admission of the confession at trial was harmless beyond a reasonable doubt. *Id.* at 1266 (Rehnquist, C.J., dissenting).

[85] *See supra* notes 42, 77, 79 and accompanying text.

[86] *See supra* notes 70-72 and accompanying text.

[87] *See supra* notes 70-72, 80-81 and accompanying text.

[88] *See supra* notes 80-81 and accompanying text.

[89] *Id.*

[90] *See supra* note 80 and accompanying text.

[91] *See supra* notes 14, 24, 42, 77.

United States Supreme Court is the guardian of constitutional rights; however, with this reasoning the Court weakens the protection of those rights.[92] The majority's decision is not irrational, since society's need to be assured that vicious acts are punishable is great.[93] However, the majority seemed to place this need in front of constitutional rights and precedent.[94] By overruling this precedent, even to fulfill such a great societal need, society appears to gain a Pyrrhic victory at best.[95]

Stephen L. Earnest

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[92] *See supra* notes 14, 40, 79.
[93] *See supra* note 3 and accompanying text.
[94] *See supra* notes 14, 77, 79 and accompanying text.
[95] *See supra* notes 3, 75, 77, 79 and accompanying text.

Civil Rights—Sex Discrimination—Fetal Protection Employment Policy Constitutes Sex Discrimination Under Title VII When Such Policy Excludes Female Employees Solely on Basis of Child-Bearing Capacity

Petitioners[1] filed a class action[2] in the United States District Court for the Eastern District of Wisconsin challenging on grounds of sex discrimination respondent's[3] employment policy[4] excluding all fertile[5] women from jobs potentially hazardous to fetal health.[6] The district court granted respondent summary judgment on the grounds that

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[1] Individual petitioners, employees of respondent, included Mary Craig, who opted for sterilization to keep her job; Elsie Nason, a divorced 50 year old female who involuntarily transferred to a lower paying job; and Donald Penney, who had a request for leave to lower his lead level for reproduction purposes denied by respondent. International Union v. Johnson Controls, Inc., 111 S. Ct. 1196, 1200 (1991).

[2] *Johnson Controls*, 111 S. Ct. at 1200. Petitioner's class, certified by the United States District Court for the Eastern District of Wisconsin, consisted of past, present, and future United Auto Workers' members employed in production and maintenance at nine of respondent's plants. *Id.*

[3] *Id.* Respondent, Johnson Controls, Inc. (Johnson Controls), was a battery manufacturer. *Id.* at 1199. An essential component in the manufacturing process of batteries was the element lead. *Id.* The district court noted that while experts disagreed on the actual effects of lead to the human body, they did agree that exposure to lead posed health risks to adults and unborn children. *Id.* at 1200.

[4] *Id.* Johnson Controls initially refused to employ women to work in any battery manufacturing jobs. *Id.* at 1199. However, in 1977, Johnson Controls established an official policy which recognized that the ultimate responsibility of fetal protection belonged to the parents, and that the treatment of fertile female employees as eventual mothers constituted illegal discrimination since not every fertile female would choose motherhood. *Id.* While Johnson Controls permitted the employment of women, it nevertheless openly discouraged women capable of childbearing from lead-exposure jobs. *Id.* Johnson Controls also required female employees to receive health risk warnings and sign statements attesting to receiving such warnings. *Id.* In 1982, Johnson Controls' employment policy changed once again to exclude certain women from lead-exposure jobs. *Id.*

[5] *Id.* Johnson Controls' employment policy excluded "women who are pregnant or who are capable of bearing children" from actual or potential lead-exposure jobs. *Id.* The policy stated that women who presented medical documentation attesting to their childbearing inability were exempt from this policy. *Id.*

[6] *Id.* Johnson Controls' policy defined "unacceptable work stations" for women as any job site with an atmospheric lead level exceeding 30 micrograms per cubic meter or where an employee's blood level had exceeded 30 micrograms per deciliter during the past year. *Id.* The Occupational Health and Safety Administration (OSHA) had noted that the critical level of lead exposure for employees planning families was blood lead levels in excess of 30 micrograms per deciliter. *Id.*

respondent adequately justified[7] the employment policy under standards[8] established in previous fetal protection cases.[9] The United States Court of Appeals for the Seventh Circuit affirmed.[10] On writ of certiorari, the United States Supreme Court, *held*, reversed and remanded.[11] Where employer's fetal protection policy excluded female employees solely on the basis of childbearing capacity, the implementation of that policy constituted sex discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978. *International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991).

Legislation that many states enacted to protect women from harsh working conditions at the turn of the century provided employers with a legal justification for gender-based discriminatory employment policies.[12] In 1908, the United States Supreme Court addressed the consti-

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[7] *Johnson Controls*, 111 S. Ct. at 1200. The district court utilized a three-step inquiry process derived from previous fetal-protection cases to determine whether "business necessity" justified a discriminatory employment policy. *Id.* In applying the business necessity defense, the district court examined (1) whether exposure to lead posed substantial health risks to the fetus, (2) whether lead exposure affected fetal health at levels safe for adults, and (3) whether a less discriminatory alternative policy existed that would protect the fetus. *Id.*

[8] *Id.* The district court determined that Johnson Controls satisfactorily justified its employment policy as a business necessity by showing that lead exposure posed health risks to a fetus at levels considered safe for adults. *Id.* Once Johnson Controls established a business necessity defense, the court found summary judgment appropriate because the petitioners failed to show any alternative means of protecting fetal safety with less discriminatory effects. *Id.*

[9] *Id.* at 1199. The district court concluded that since Johnson Controls' employment conditions satisfied each step of the business necessity defense, then an analysis of other possible defenses for the respondent was unnecessary. *Id.* at 1200.

[10] *Id.* The Court of Appeals for the Seventh Circuit agreed with the district court that the business necessity defense was the correct measure to analyze fetal-protection employment policies. *Id.* Additionally, the court of appeals concluded that since Johnson Controls' fetal-protection policy was reasonably necessary to promote industrial safety, summary judgment was also appropriate under the BFOQ defense. *Id.* at 1201.

[11] *Id.* at 1202. The United States Supreme Court granted certiorari to resolve the conflict among the Fourth, Seventh, and Eleventh Circuits regarding the qualification of a gender-specific fetal-protection policy as a BFOQ. *Id.* The Court also granted certiorari to address the important question of whether an employer's interest in protecting fetal safety could have legitimately justified an employment policy that discriminated against fertile females. *Id.*

[12] Note, *Constitutional Law — Regulation of Conditions of Employment of Women: A Critique of* Muller v. Oregon, 13 B.U.L. REV. 276, 278-82 (1933) (authored by Blanche Crozier). During the latter decades of the nineteenth century and the early decades of this century, wages were extremely low and work hours excessively long for both male and female factory laborers in this country. *Id.* at 283. Consequently, states enacted

tutional issue of state statutory limitations on the number of hours that females could work in *Muller v. Oregon*.[13] The *Muller* Court,[14] in upholding the constitutionality of the statute, reasoned that the societal interest in protecting the health of future offspring by preserving the health of working mothers justified the statutory restriction upon female employment.[15] Although the Court recognized that certain employment restrictions upon men and women were unconstitutional on due process grounds,[16] the Court distinguished the Oregon statute by noting that inherent gender differences necessitated protective employment legislation for women.[17]

Federal prohibition against sexual discrimination evolved from Title VII of the Civil Rights Act of 1964 (Title VII)[18] and the Pregnancy

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legislation to lessen the effect of the harsh working conditions for women. *Id.* Such legislation typically restricted the amount of time that women could work during a given period. *Id.*

[13] 208 U.S. 412 (1908).

[14] *Muller*, 208 U.S. at 421-23. The trial court convicted the employer, Curt Muller, of violating an Oregon statute that prohibited the employment of women in factories, laundries, and mechanical establishments for more than 10 hours per day. *Id.* at 416-17.

[15] *Id.* at 421-23. The *Muller* Court noted evidence indicating that jobs requiring many hours of continuous standing on a daily basis ultimately led to injurious effects upon female employees because of their physical structure. *Id.* at 421. Consequently, the Court reasoned that such work threatened the safety of future offspring since the well-being of the offspring depended upon the mother remaining physically healthy. *Id.*

[16] *Id.* at 418-19. The Court noted that state legislation which limited the number of hours that a laborer could work interfered with an individual's freedom of contract, and therefore violated due process. *Id.*; *see* Lochner v. New York, 198 U.S. 45, 64 (1905) (state law that limited number of hours male or female bakery employee could work interfered with right to contract and violated due process).

[17] *Muller*, 208 U.S. at 421-22. The *Muller* Court reasoned that even without legislative limitation upon contractual rights, women were members of a weaker class disadvantaged in the workplace, and therefore needed special protection to secure true equality. *Id.* The Court based its conclusion upon the finding that women were "so constituted" as to make them ultimately dependent upon men for security. *Id.* at 422.

[18] Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a) (1988). Section 703(a) of the Civil Rights Act of 1964, the impetus for prohibition against discrimination in employment decision-making, provided:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Discrimination Act of 1978.[19] Despite the uncertainty surrounding the congressional motives behind the inclusion of "sex" within the protected classification of Title VII,[20] courts consistently found that Title VII pre-empted gender-specific employment practices.[21] In determining whether employment practices constituted unlawful discrimination violative of Title VII, courts developed a framework that classified an employment practice according to whether it (1) facially discriminated, (2) pretextually discriminated, or (3) disproportionately impacted upon a member of any group protected under Title VII.[22]

The first framework theory emerged with the case of *Griggs v. Duke Power Co.*[23] By holding that a facially neutral employment policy[24] that adversely affected members of a particular class[25] violated

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Id.

[19] Civil Rights Act of 1964 § 701(k), 42 U.S.C. § 2000e(k) (1988). The Pregnancy Discrimination Act amended Title VII by adding subsection (k) to section 701 and provided in pertinent part:

> The terms "because of sex" or "on the basis of sex" [within Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .

Id.

[20] Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 74 (1980). Congress enacted Title VII in response to racially discriminatory employment procedures. *Id.* Congressional opposition to the passage of Title VII amended the bill to include "sex" as another prohibited classification primarily to defeat or at least damage the entire bill. *Id.* The plan to defeat the bill failed, however, and Title VII passed as amended. *Id.* at 74-75.

[21] Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1225 (9th Cir. 1971). The court found that state statutes which limited the type of work available for women opposed the general goals of Title VII. *Id.* Therefore, the court held that Title VII superceded such statutes through the Supremacy Clause. *Id.*

[22] Note, *Fetal Vulnerability and the 1978 Pregnancy Amendment* - Wright v. Olin Corp., 19 WAKE FOREST L. REV. 905, 912 (1983) (authored by Jimmie Phillips). Under traditional Title VII law, the particular Title VII group involved in a discriminatory action did not affect the analysis of the challenged employment practice. *Id.* at 914. The Title VII analysis focused upon the discriminatory nature of an employment practice rather than upon the Title VII protected group. *Id.*

[23] 401 U.S. 424 (1971).

[24] *Griggs*, 401 U.S. at 427-28. Duke Power Company's employment policy conditioned employment or transference between departments upon the applicant or transferee possessing a high school diploma or passing two standardized general intelligence tests. *Id.*

[25] *Id.* at 430. The Supreme Court determined that although the employment policy

Title VII, the Supreme Court announced an expansion to Title VII analysis.[26] The Court reasoned that Title VII applied to neutral employment practices with discriminatory effects in addition to overtly discriminatory practices[27] because the congressional objective of Title VII was the promotion of employment equality and the removal of previous discriminatory obstructions to this goal.[28] The critical factor in analyzing such cases was whether business necessity required the discriminatory policy.[29] The Court held that to constitute a business necessity, a policy must evaluate a person's job performance potential[30] rather than the person in the "abstract."[31] Furthermore, the Court noted that since Congress had intended Title VII to examine the consequential nature of employment policies, then an employer's intent

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was facially neutral, the impact upon Negro applicants or transferees was far more detrimental than on their white co-workers. *Id.* The Court noted that Negroes were substantially less likely to complete high school or pass such intelligence tests because Negroes received inadequate education in North Carolina during the 1960's. *Id.* at 430 n.6.

[26] *Id.* at 431. Although the Court stated that Congress provided for the expansion of Title VII analysis to include facially neutral employment practices with discriminatory effects, the Court offered no authority to support the proposition. *Id.*; *see* Williams, *Firing the Women to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 672 (1981) (possible rationale for *Griggs* expansion of Title VII was that many "neutral" employment policies reflected particular characteristics and attributes unique to particular group).

[27] *Griggs*, 401 U.S. at 429-30. The Court concluded that the statistical evidence of the employment policy's disparate impact on Negroes was sufficient to establish a prima facie case of discrimination. *Id.* at 430-32. *But see* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-52 (1988) (statistical disparities without source-policy identification and causation proof support could not have established disparate impact case); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (in establishing disparate impact prima facie case, plaintiff's burden went beyond merely establishing that statistical disparities existed in employer's work force).

[28] *Griggs*, 401 U.S. at 429-30. The Court stated that while Title VII did not require employers to hire individuals solely because they were a member of a class protected under Title VII, it did require employers to remove all "critical, arbitrary, and unnecessary" employment requirements that operated in a discriminatory manner. *Id.* at 430-31.

[29] *Id.* at 431. Duke Power Company implemented the employment requirements on the basis of its own subjective determinations that such requirements would benefit the company. *Id.*

[30] *Id.* The Court noted that the employer had conducted no "meaningful study" of how the employment requirements related to employee job performance. *Id.*; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425, 435 (1975) (Court found employer's study did not justify discriminatory employment testing requirements as job-related necessity).

[31] *Griggs*, 401 U.S. at 436. Duke Power Company failed to produce evidence indicating that a "demonstrable relationship" existed between its employment requirements and successful job performance. *Id.* at 431-32.

behind adopting such a policy represented an irrelevant factor in Title VII analysis.[32]

The Court in *McDonnell Douglas Corp. v. Green*[33] developed the second theoretical framework that focused on the disparate treatment of the employee rather than the impact upon the employee's class.[34] To establish a prima facie case[35] in such an action, the Court stated that an employee needed only to prove unfair treatment from the employment decision.[36] Once the employee established a prima facie case of discrimination, the employer then had the burden of articulating a "legitimate, nondiscriminatory"[37] explanation to justify the challenged employment decision.[38] The Court held that if the employer satisfacto-

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[32] *Id.* at 432. Duke Power Company followed a policy of intentional discrimination prior to Title VII, but ceased such conduct following its passage. *Id.* at 428. The Court concluded that Congress placed heavy reliance on employment requirements to make considerations of an individual's classification irrelevant. *Id.*

[33] 411 U.S. 792 (1973).

[34] *McDonnell Douglas*, 411 U.S. at 805-06. Petitioner, McDonnell Douglas Corp. (McDonnell Douglas), laid off respondent Green, a black civil rights activist, in the course of an ordinary work force reduction. *Id.* at 794. Green protested the discharge by participating in various illegal activities directed at disrupting the petitioner's business operations. *Id.* at 794-95. McDonnell Douglas subsequently advertised for qualified applicants, and Green applied for re-employment. *Id.* When McDonnell Douglas refused to re-employ Green on grounds of his participation in illegal conduct, Green filed a complaint claiming that McDonnell Douglas' refusal to re-employ him because of racial considerations and participation in the civil rights movement violated Title VII. *Id.*

[35] *Id.* at 802. The Court stated that to establish pretextual discrimination, the claimant must have shown that (1) the claimant belonged to a Title VII protected class; (2) the employer sought applications for a position that the claimant applied and was qualified to perform, (3) the employer rejected the claimant; and (4) the employer continued to accept applications for the position that remained open after the rejection of the claimant. *Id. See generally* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 531-39 (1981) (analysis of competing relationship between pretext and racial discrimination theories in disparate treatment cases).

[36] *McDonnell Douglas*, 411 U.S. at 803. Green satisfactorily established a prima facie case of disparate treatment by showing that McDonnell Douglas (1) continued to seek applicants of Green's trade following his rejection, (2) acquiesced Green's qualifications, and (3) acknowledged that Green's past job performance was satisfactory. *Id.*

[37] *Id.* In recognizing that McDonnell Douglas' subjective reason for rejecting Green was sufficient to satisfy its burden of proof, the Court noted that the court of appeals "seriously underestimated" the importance and weight of McDonnell Douglas' reason. *Id.*; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (Congress and Supreme Court had preserved Title VII's recognition of and deference to employer's prerogatives and legitimate business judgments); Furnco Constr. Co. v. Waters, 438 U.S. 667, 677-78 (1978) (employer needed only to establish that its employment policy was reasonably related to pursuance of legitimate goal).

[38] *McDonnell Douglas*, 411 U.S. at 802. The Court noted that an employer could

rily stipulated an explanation for the employment decision, the employee had the opportunity to demonstrate that the reason articulated by the employer was merely a pretext[39] for intentional discrimination.[40] An employee could introduce proof of the employer's discriminatory intent through comparative or statistical evidence indicating the discriminatory nature of the policy.[41] While the consequential effects of an employment policy upon employees of a Title VII protected classification provided evidence of discriminatory intent for both disparate impact and pretext discrimination cases, courts also examined situations in which an employer's discriminatory intent was explicit in the policy itself.[42]

The Supreme Court provided the parameters for the third theoretical framework in *Dothard v. Rawlinson*.[43] In *Dothard*, the Court held that a state employer's administrative regulation[44] which established gender criteria for the exclusion of women from certain job position assignments[45] facially discriminated against females solely on the basis

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justify an employment decision that adversely affected a member of a Title VII protected class only if the employer applied the standard used in the employment decision equally to all classes. *Id.* at 804.

[39] *Id.* The Court indicated that the availability of other less discriminatory methods which could equally satisfy the employer's objections was especially relevant in the pretextual discrimination analysis. *Id.*; *see also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (evidence showing genuine issue of fact relating to whether employment decision discriminated against employee was sufficient to satisfy employer's burden).

[40] *McDonnell Douglas*, 411 U.S. at 804. The *McDonnell Douglas* Court also concluded that on retrial, the trial court should consider evidence of past discriminatory conduct on the part of McDonnell Douglas relevant in a pretext determination. *Id.*

[41] *Id.* at 805. However, the Court cautioned against relying solely upon such general measurements in developing conclusions about an employer's decision. *Id.* at 805 n.19.

[42] Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971). In *Phillips*, the Court examined whether Title VII permitted separate hiring policies for women and men with pre-school-age children. *Id.* at 543. The Court held that a separate employment policy for women that limited the number of females hired constituted sex discrimination violative of Title VII. *Id.*

[43] 433 U.S. 321 (1977).

[44] *Dothard*, 433 U.S. at 333. The employer, Alabama Board of Corrections, rejected Diane Rawlinson's application for employment as a prison guard on the ground that she failed to meet the minimum height and weight standards for such employment established by an Alabama statute. *Id.* Consequently, Rawlinson brought a class action against the employer that claimed the statutory employment standards violated Title VII. *Id.* While the suit was pending, the employer adopted a gender-specific administrative regulation for maximum security prison guard assignments that necessitated "continual close physical proximity" to prisoners. *Id.* Rawlinson subsequently amended her complaint to include a Title VII challenge against the administrative regulation. *Id.*

[45] *Id.* The administrative regulation provided that prison wardens would designate

of their gender.[46] In cases of such explicit discrimination, the Court stated that an employer could only justify an allegedly facially discriminatory employment policy[47] through the existence of a bona fide occupational qualification (BFOQ).[48] The Court, however, noted that the BFOQ defense provided employers with only an extremely narrow exception[49] to Title VII prohibitions.[50] For an employment policy to fall

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prison guard positions that required either male or female employees. *Id.* at 325 n.6. The regulation listed several factors for wardens to utilize in designating such positions. *Id.* The criteria focused upon whether the sex of a prison guard would create problems concerning prison disruption, inmate privacy, and the safety of the individual prison guard. *Id.*

[46] *Id.* at 333. The *Dothard* Court initially applied disparate impact analysis to the state statute that established the prison guard height and weight standards and found that the statute violated Title VII. *Id.* at 328-33.

[47] *Id.* at 332. The Court indicated that evidence showing the employment policy facially discriminated against every member of a class protected under Title VII was sufficient to establish a prima facie case of discrimination within the facial discrimination framework. *Id.* at 333 n.16. Evidence presented in the district court revealed that of the available prison guard positions in the Alabama prison system, the administration regulation permitted consideration of women for approximately 25% of these positions. *Id.* at 332 n.16.

[48] *Dothard*, 433 U.S. at 332-33. Section 703(e) of the Civil Rights Act of 1964, the bona fide occupational qualification defense, provided:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Civil Rights Act of 1964, § 703(e), 42 U.S.C. § 2000e-2(a) (1988).

[49] *Dothard*, 433 U.S. at 334-35. The *Dothard* Court noted that the federal courts uniformly agreed that since Title VII prohibited employment policies based on stereotypical characterizations of a class, then the judiciary should interpret exceptions available for such policies very narrowly. *Id.* at 433-34; *see also* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 717 (1978) (higher costs of providing benefits to women than men were insufficient to justify facially discriminatory policy since Title VII provided no cost-justification defense).

[50] *Dothard*, 433 U.S. at 344. The *Dothard* Court, however, found that a BFOQ existed which justified the administrative regulation. *Id.*; *see* Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971) (BFOQ defense limited to cases in which employment of members from discriminated class would undermine "essence" of business functions); Weeks v. Southern Bell Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (to establish BFOQ defense, employer must reasonably believe that "all or substantially all" employees in class would perform their job duties in unsafe manner); *see also* Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 862 (7th Cir. 1974) (adopted *Diaz* approach but rejected *Weeks* approach for establishment of BFOQ defense in busing industry because of overriding safety factors), *cert. denied*, 419 U.S. 1122 (1975). *But see* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235-36 (5th Cir. 1976) (adopted both *Diaz* and

within the narrow margin of the BFOQ defense, the Court indicated that the employer must have demonstrated that either the "essence" of the business operations or the safety of third parties directly affected by the operations depended upon the overt classification.[51] When overtly discriminatory policies excluded women on the basis of reproductive conditions or capabilities, courts experienced difficulty in determining which theoretical framework to categorize such policies for proper Title VII analysis.[52] Congress resolved the judicial difficulty by bringing employment considerations of pregnancy or pregnancy-related conditions under Title VII constraints with the passage of the Pregnancy Discrimination Act of 1978.[53]

Weeks approaches for establishment of BFOQ defense in busing industry since analysis under both approaches better served safety of third parties). *See generally* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 416 (1985) (every court of appeals that has analyzed BFOQ defense based on safety considerations utilized *Tamiami* standard).

[51] *Dothard*, 433 U.S. at 334. While noting that risks to the individual applicant were irrelevant considerations in establishing a BFOQ defense since Title VII provided the individual the right to make that decision, the Court indicated that the sex of a prison guard posed additional risks. *Id.* First, the Court noted that many of the prison inmates were sex offenders who would likely attack a female guard solely because of her gender. *Id.* Second, the Court concluded that a female guard's gender directly risked the essence of a prison's operations and a prison guard's job: the ability to maintain prison security. *Id.* Third, the Court noted that the gender of a prison guard directly risked harm to other guards and inmates, as well as to the female guard herself. *Id.*; *see* Torres v. Wisconsin Dep't of Health & Social Serv., 859 F.2d 1523, 1527-28 (7th Cir. 1988) (en banc) (court found BFOQ applied to policy excluding males from positions in all-female prison), *cert. denied*, 489 U.S. 1017 (1989). *But see* Gunther v. Iowa State Male's Reformatory, 462 F. Supp. 952, 958 (N.D. Iowa 1979) (court refused to find existence of BFOQ in case involving similar claims and all-male prison), *aff'd*, 612 F.2d 1079 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980). *See generally* Comment, *Fetal Protection and* UAW v. Johnson Controls, Inc.*: Job Openings for Barren Women Only*, 58 FORDHAM L. REV. 843, 852 (1990) (authored by Marcelo Riffand) (every judicial test developed for BFOQ defense indicated that employer must establish relationship between job performance ability of individual and gender).

[52] Note, *Title VII and Exclusionary Employment Practices: Fertile and Pregnant Women Need Not Apply*, 17 RUTGERS L.J. 95, 115-19 (1985) (authored by Allison Accurso). Although Title VII specifically prohibited employers from considering an employee's gender in making employment decisions, courts initially refused to classify pregnancy or pregnancy-related conditions under the sex classification for Title VII purposes. *Id.* at 110-11; *see* Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977) (utilized disparate impact/business necessity analysis of employment policy that stripped women returning from maternity leave of seniority); General Electric Co. v. Gilbert, 429 U.S. 125, 136 (1976) (Court upheld exclusion of pregnancy-related disabilities from comprehensive disability program since pregnancy-based exclusion was not violative of Title VII); Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (in case factually similar to *Gilbert*, Court upheld pregnancy-based exclusion policy since gender was not factor in employment decision).

[53] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 675-76

The first significant post-Pregnancy Discrimination Act case to apply Title VII to a fetal protection employment policy[54] was *Wright v. Olin Corp.*[55] The *Wright* court considered the legality of a three-tiered fetal protection policy.[56] After assessing the three Title VII theoretical frameworks, the Fourth Circuit Court of Appeals concluded that the disparate impact/business necessity defense was "best suited"[57] for the Title VII analysis of a fetal protection policy while both the pretext[58]

(1983). The Court found that employment policies based upon a woman's pregnancy fell exclusively within the facially discriminatory framework. *Id.* at 684.

[54] Comment, *Fetal Protection Under Title VII — Rebutting the Procreation Presumption*, 46 U. PITT. L. REV. 755, 775-80 (1985) (authored by Alan Blanco). Court opinions from cases that applied pre-Pregnancy Discrimination Act law to fetal-protection policies differed considerably from opinions of cases that applied post-Pregnancy Discrimination Act law. *Id.* at 778; *see* Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992 (1982) (applying disparate impact analysis, court reasoned that consideration of employer's business necessity defense to fetal protection policy was unnecessary since female employee had shown existence of available, less discriminatory alternative); Doerr v. B.F. Goodrich, Co., 484 F. Supp. 320, 326 (N.D. Ohio 1979) (employment policy excluding fertile females from jobs involving exposure to hazardous chemicals represented legitimate, business necessity to extent that risk was greater for fetus than for males); *see also* Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 CHI. L. REV. 1219, 1264-65 (1986) (fetal protection policies posed danger to fetal safety from lack of income and necessary medical insurance coverage caused by mother's exclusion).

[55] 697 F.2d 1172 (4th Cir. 1982).

[56] *Wright*, 697 F.2d at 1182. The employer, Olin Corporation, adopted a "female employment and fetal vulnerability program" that categorized jobs by three classifications: (1) restricted jobs that may require employees to work around chemicals containing "known or suspected abortifacient or teratogenic agents"; (2) controlled jobs that may require minimum contact with hazardous chemicals; and (3) unrestricted jobs that posed no health dangers to a pregnant employee or fetus. *Id.* The policy allowed all women access to the unrestricted jobs while only nonpregnant females who signed a health warning statement could fill controlled jobs. *Id.* However, the policy prohibited all fertile women from restricted jobs. *Id.* The employer considered all women from ages five to 63 as fertile unless the company's medical staff confirmed the infertility. *Id.* While a significant number of the 265 available job classifications fell within the controlled category, the employer only categorized 12 jobs as restricted. *Id.* However, these job categorizations affected five of the 11 lines of progression. *Id.*

[57] *Id.* at 1185. While the court found that the employer was "entitled" to have judicial consideration of the defense that it advanced under the business necessity theory, reconstruction of the disparate impact theoretical framework was necessary before the court could apply it to the case. *Id.* at 1186 n.21. The *Wright* court dismissed the traditional disparate impact analysis of examining the "facial neutrality" of an employment policy by stating that the essence of the theory rested with the consequential nature of a policy rather than the policy's neutrality. *Id.* at 1186.

[58] *Id.* at 1185. The *Wright* court determined that disparate treatment analysis was impractical since both the factual claim and factual defense presented did not correlate with the disparate treatment framework. *Id.* at 1185 n.20. The court noted that the claim

and facial[59] discrimination theories were inappropriate for such analysis.[60] In considering[61] the extent of situations in which courts could apply the disparate impact theory,[62] the court held that an employer could establish a business necessity defense to an otherwise discriminatory employment policy based on the necessity to protect the health of unborn children.[63] The *Wright* court concluded that once an employer

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differed from the typical disparate treatment claim since it indicated a manifest intent to discriminate rather than a circumstantial intent. *Id.* The court also noted that the defense centered upon justification of the discriminatory policy rather than denial of the intent. *Id.*

[59] *Id.* at 1185. The court offered two reasons for rejecting the argument that the Pregnancy Discrimination Act mandated courts to use the facial discrimination/BFOQ theory in analyzing such fetal-protection policies. *Id.* at 1183-84 n.17. First, the facial discrimination theory would have prevented the assertion of the justification defense presented by the employer. *Id.* at 1185 n.21. Second, the court simply found that since a BFOQ defense was not attempted, then the court would not force the employer to present one. *Id.* at 1186 n.21. *See generally* Katz, *Hazardous Working Conditions and Fetal Protection Policies: Women are Going Back to the Future*, 17 B.C. ENVTL. AFF. L. REV. 201, 214-17 (1989) (commentary criticizing *Wright* for rejecting facial discrimination/BFOQ defense analysis).

[60] *Wright*, 697 F.2d at 1185. The *Wright* court justified an assessment of each Title VII theoretical framework by stating that none of the theories was absolutely applicable to the factual situation presented. *Id.* at 1184-85.

[61] *Id.* at 1187-90. Although the court concluded that the evidence of the fetal protection policy's existence and operation established a prima facie case of Title VII discrimination, it could not find the evidence presented sufficient to establish a business necessity defense. *Id.* at 1187. Therefore, the court remanded the case for further proceedings. *Id.*

[62] *Id.* at 1188-89. The court began its analysis of the business necessity defense by immediately departing from the job-relatedness "necessity" concepts developed in *Griggs*. *Id.* at 1188. Instead, the *Wright* court adopted the workplace safety "necessity" approach formulated in Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971), *and cert. dismissed*, 440 U.S. 1007 (1971). *Wright*, 697 F.2d at 1188.

[63] *Wright*, 697 F.2d at 1189. The *Wright* court noted that while the safety of the particular employee could not serve as a business necessity, the safety of other people related to the business operations, such as customers or fellow employees, had served to establish a business necessity. *Id.* at 1188-89. By analogizing an employer's interest in the safety of unborn children with its legitimate interest in protecting the safety of customers, the court found that safety concerns of unborn children could constitute a business necessity that would justify a fetal protection policy. *Id.* at 1189; *see* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) (finding that passenger safety justified employment policy excluding drug users from transit positions rebutted statistical showing of disparate impact by employer). *But see* Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 371 (4th Cir. 1980) (en banc) (court refused to consider employer's interest in welfare of female employee or her fetus as valid business necessity), *cert. denied*, 450 U.S. 965 (1981)).

had satisfactorily established the element of proof required for a business necessity defense,[64] the employee had the opportunity to rebut the defense as in a disparate treatment analysis.[65]

Two years after the *Wright* court concluded that the disparate impact/business necessity theory was the appropriate standard to apply to fetal-protection policy cases, the Eleventh Circuit Court of Appeals conducted its own analysis of each Title VII framework theory and concluded differently in *Hayes v. Shelby Memorial Hosp.*[66] After determining that the Pregnancy Discrimination Act mandated that pregnancy-based employment policies were never neutral,[67] the *Hayes* court[68] eliminated the pretext discrimination theory from the analysis and concluded that the facial discrimination theory was applicable.[69] The court rejected the employee's argument that the only affirmative defense available to an employer under the facial discrimination theory was through the establishment of a BFOQ.[70] Instead, the court decided

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[64] *Wright*, 697 F.2d at 1190-91. To establish a business necessity defense for a fetal protection policy, the *Wright* court found that the employer had the burden of persuasion to prove by independent, objective evidence that (1) a significant risk to the safety of the fetus existed, (2) the risk was such that only women needed protection, and (3) the employer crafted the fetal protection policy to address that purpose. *Id.*

[65] *Id.* at 1191. The court noted that the manner in which an employee could rebut an employer's establishment of a prima facie business necessity defense was met by showing the existence of alternatives that would have accomplished the identical results as the fetal protection policy with less discriminatory results. *Id.* In defense of utilizing the disparate treatment rebuttal theory while maintaining a disparate impact analysis, the court noted that their interpretations of relevant Title VII opinions indicated that the pretext theory did not exercise absolute dominion over an employee's use of rebuttal evidence. *Id.* at 1192 n.30.

[66] 726 F.2d 1543 (11th Cir. 1984).

[67] *Hayes*, 726 F.2d at 1546. Shelby Memorial Hospital, the employer, fired Sylvia Hayes, an X-ray technician, upon learning of her pregnancy. *Id.* at 1546. The employer claimed that the dismissal resulted from an inability to locate alternative employment for Hayes. *Id.* Consequently, Hayes brought suit against the employer alleging Title VII violations. *Id.* The district court held in favor of Hayes, and the employer appealed. *Id.*

[68] *Id.* at 1547. The *Hayes* court reasoned that no facially neutral employment policy existed to analyze under the pretext discrimination theory since the employee admitted firing Hayes because of her pregnancy. *Id.* at 1548. The court noted, however, that had the employer based the dismissal of Hayes on other grounds, such as inefficiency, then a pretext discrimination analysis was possible. *Id.* at 1548 n.6.

[69] *Id.* at 1547-48. The *Hayes* court stated that an employee could utilize the pretext discrimination analysis, despite the Pregnancy Discrimination Act, in situations where a fetal protection policy purports a neutral business goal, such as general employee health. *Id.* at 1547-48 n.5.

[70] *Id.* at 1548-49. The court concluded that the traditional BFOQ defense was inapplicable to fetal protection policy analysis unless the employer could demonstrate that the policy had a direct relationship with a pregnant or fertile female's job performance.

that the nature of an employment policy applicable only to pregnant employees created a presumption of facial discrimination.[71] However, the court noted that the employer could rebut the presumption by showing that the policy was neutral in the manner that it protected the unborn children of all employees.[72] Despite concluding that an employer could not establish a BFOQ defense to the established facial discrimination, the court nevertheless analyzed the case under the disparate impact theory.[73] Thus, under both the *Wright* and *Hayes* decisions, an employer could ultimately justify a fetal-protection employment policy through the application of a business necessity defense, despite the Pregnancy Discrimination Act.[74]

Id. at 1549; *see In re* National Airlines, Inc., 434 F. Supp. 249, 259-61 (S.D. Fla. 1977) (despite indications that pregnancy posed danger to passengers, court found nonpregnancy was not BFOQ since fetal safety rested with mother). *But see* Levin v. Delta Air Lines, Inc., 730 F.2d 994, 998-99 (5th Cir. 1984) (when possible pregnancy would risk passenger safety, nonpregnancy constituted BFOQ); Condit v. United Air Lines, Inc., 558 F.2d 1176, 1176 (4th Cir. 1977) (per curiam) (nonpregnancy constituted BFOQ when pregnancy incapacitated stewardess, thereby threatening passenger safety), *cert denied*, 435 U.S. 934 (1978).

[71] *Hayes*, 726 F.2d at 1548. To rebut the presumption of discrimination established by a fetal protection policy, the court held that an employer must provide objective, scientific evidence showing (1) that female employees' exposure to toxic hazards in the workplace created a substantial health risk to their fetus or future offspring, and (2) that the health hazard posed danger to fertile or pregnant female employees, but not to men. *Id.*

[72] *Id.* The court noted that it borrowed the employer rebuttal requirements from the business necessity requirement in *Wright* and, consequently, required an "identical" showing from employers. *Id.* at 1548 n.8. The *Hayes* court, however, did not apply the business necessity label to the *Hayes* requirements because of the different theoretical approach taken. *Id.*; *see also* Note, International Union, UAW v. Johnson Controls, Inc.: *Fetal Protection and Title VII Revisited*, 7 J. CONTEMP. HEALTH L. & POL'Y 367, 374 (1991) (authored by Patrick Clendenen) (theoretical approaches taken in *Wright* and *Hayes* effectively authorized employers to justify exclusion of females based solely on altruistic societal values).

[73] *Hayes*, 726 F.2d at 1552-54. Since the employment policy only affected women, the court concluded that a disparate impact claim automatically existed. *Id.* at 1552. The court further reasoned that because the employer had already demonstrated in overcoming the discrimination presumption the justification of the challenged policy on a scientific basis, then the business necessity defense was also automatically established. *Id.* at 1553. To require more, the court determined, would have prevented employers from adopting fetal protection policies under any circumstances. *Id.*

[74] Note, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577, 590 (1986) (authored by Emily Buss). The holding in *Wright* and *Hayes* that the business necessity of safe and efficient operations justified a male-only employment policy suggested that "safety" applied only to men. *Id.*

In *International Union v. Johnson Controls, Inc.*, the United States Supreme Court reasoned that since respondent Johnson Controls' fetal-protection policy facially classified employees on a gender basis,[75] a BFOQ defense represented the only available means[76] that Johnson Controls could utilize in justification of its policy.[77] The Court recognized that because the employment policy was unrelated to any safety considerations of third parties indispensable to the battery manufacturing business,[78] Johnson Controls could not utilize the safety exception to the BFOQ as a defense to its policy.[79] Furthermore, the Supreme Court concluded that since fertile females[80] had performed

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[75] International Union v. Johnson Controls, Inc., 111 S. Ct. 1196, 1202 (1991). The court of appeals applied the same analysis to Johnson Controls' policy as that which other appellate courts had applied to other gender-based fetal-protection policies. *Id.* at 1203. Consequently, the court of appeals determined that the policy was neutral on its face with only a "discriminatory effect upon the employment opportunities of women." *Id.* The facially neutral determination permitted the court of appeals to consider the more lenient business necessity standard. *Id.* The Supreme Court criticized the analysis of the court of appeals. *Id.* The Court stated that the Pregnancy Discrimination Act clearly indicated an employment policy that explicitly classified on the reproductive capabilities of female employees and which required only female employees to submit medical proof of the inability to bear offspring was nonneutral and facially discriminatory under Title VII. *Id.* Additionally, the Supreme Court noted that the court of appeals' assumption that the measures behind such a fetal-protection employment policy were "ostensibly benign" and therefore not unlawful sexual discrimination was wrong. *Id.*

[76] *Id.* at 1204. The Supreme Court noted that an employer's motives behind an explicit gender-based fetal protection policy neither altered the underlying purposeful discriminatory nature of the policy nor authorized justification of the policy through a business necessity defense. *Id.*

[77] *Id.* The Court noted that the Equal Employment Opportunity Commission (EEOC) had issued a report stating that justification of a facially explicit discrimination policy through a business necessity defense was contradictory to settled Title VII law. *Id.* Rather, the EEOC thought that a BFOQ would serve Title VII law better. *Id.*

[78] *Id.* at 1205-06. The Court followed the narrow standard for application of the safety exception to the BFOQ established in previous fetal protection cases. *Id.* A sexually discriminatory policy could only fall within the narrow BFOQ exception when a woman's sex or pregnancy actually hindered her ability to perform the assigned job task properly, thereby risking the safety of third parties. *Id.* The Court noted that it did not consider the person's ability to complete the assigned task independently from the safety exception analysis. *Id.* at 1205.

[79] *Id.* at 1205-06. The Supreme Court had allowed third party safety concerns to enter into a BFOQ analysis only when such concerns related to either the "essence" of the job task or to the "central mission of the employer's business." *Id.*

[80] *Johnson Controls*, 111 S. Ct. at 1207. The Court noted that eight female employees reported pregnancies from 1979 to 1983. *Id.* at 1199-1200. Although the blood lead levels of those females during their pregnancies remained above the safety level established by OSHA, Johnson Controls could not show that any of the infants suffered from a birth defect or abnormality. *Id.* at 1200, 1208. Additionally, the Court noted that the

efficiently[81] in battery manufacturing[82] and Congress had determined that concern over fetal safety rested solely with the parents rather than the parents' employers,[83] Johnson Controls had no basis to establish a BFOQ.[84]

In a concurring opinion,[85] Justice White stated that since the language of the BFOQ statute did not automatically preclude its use as a defense for gender-specific fetal-protection policies,[86] the Court should not interpret the statute so narrowly as to classify broadly any such policy as unlawful sexual discrimination.[87] Justice White further noted that since the protection of the fetus during the performance of the job tasks was a legitimate safety concern, the safety exception to the BFOQ could justify a sex-specific fetal-protection policy.[88] Further-

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national birth rate among all women capable of child bearing was nine percent annually. *Id.* at 1208. However, the birth rate percentage for blue-collar fertile females over the age of 30 was only two percent. *Id.*

[81] *Id.* at 1207. Johnson Controls argued that its policy of excluding all women capable of child-bearing from lead-exposure jobs was necessary due to the virtual impossibility of determining future pregnancies of female employees who worked in those jobs. *Id.* at 1208. However, the Court rebuked Johnson Controls' argument by noting that it provided no evidence that women were incapable of accomplishing the tests involved with such jobs safely and efficiently. *Id.*

[82] *Id.* at 1207. While OSHA had developed safety level guidelines for lead exposure, the Court noted that OSHA reached the conclusion that absolutely no justification existed for employment policies that excluded fertile females from certain jobs for the sole purpose of protecting the fetus. *Id.* at 1208.

[83] *Id.* at 1207. In a separate concurrence, Justice Scalia agreed that since Congress had provided parents with the authority to make career decisions that could affect their children, then an employer could not exclude pregnant women from jobs that could place their children at risk. *Id.* at 1216 (Scalia, J., concurring).

[84] *Id.* at 1207. The Supreme Court analyzed the wording of the statutory BFOQ defense and found that the exceptions applied only to very limited situations. *Id.* at 1204. The Court concluded that the precise wording of the BFOQ defense indicated a concern for examining an employee's job attributes. *Id.*

[85] *Johnson Controls, Inc.*, 111 S. Ct. at 1210 (White, J., concurring). Chief Justice Rehnquist and Justice Kennedy joined in the concurring opinion filed by Justice White. *Id.* (White, J., concurring).

[86] *Id.* (White, J., concurring). Justice White criticized the Court for its restrictive interpretation of the BFOQ statute. *Id.* Justice White concluded that for a BFOQ defense to apply to its job-related employment restriction policy, Johnson Controls' normal business operations must reasonably depend upon the restrictions. *Id.* (White, J., concurring).

[87] *Id.* (White, J., concurring). Justice White presented three examples of sex discrimination that the Court permitted even though the sex of the employee did not hinder the performance of the job tasks: a female nurse employed for an elderly lady, an all-male professional sports team, and a masseur. *Id.* at 1214 n.8 (White, J., concurring).

[88] *Id.* at 1212-13 (White, J., concurring). Justice White noted that in previous Su-

more, the concurring opinion stated that the Court relied largely upon the financial expenditures necessary to eliminate the discriminatory aspects from the operation of a business.[89] Therefore, a proper BFOQ analysis must consider the ultimate costs that an employer would incur in changing the business' operations.[90] Justice White concluded that since the language and legislative history of the Pregnancy Discrimination Act clearly indicated that Title VII antidiscrimination provisions applied to pregnancy-related conditions,[91] the scope of the BFOQ defense was the same for pregnancy-based discrimination cases as it was for other Title VII cases.[92]

The United States Supreme Court's decision in *Johnson Controls* will ensure that employers implement health and safety employment policies fairly without denying women their hard fought equal employment opportunities under Title VII.[93] The *Johnson Controls* decision brings fetal protection employment policies into traditional Title VII framework analysis that will clearly direct courts to the appropriate analysis to apply.[94] As a result, uniformity among sex discrimination decisions will once again exist to provide employers with precedential guidance.[95] Consequently, since employers will find it extremely diffi-

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preme Court cases, the Court's safety exception analysis considered whether an employer's public safety concerns served as the principal basis for the implementation of the job qualification. *Id.* at 1212. To perform a job safely, Justice White stated, not only included protection of third parties, but also fetal protection. *Id.* (White, J., concurring).

[89] *Id.* at 1213 (White, J., concurring). Justice White stressed that the case law upon which the Court relied in refusing to consider the employer's cost-factors did not consider such costs irrelevant in a BFOQ analysis. *Id.* Instead, Justice White maintained the case law that analyzed the BFOQ defense confirmed that employer cost considerations could fall within the defense and serve to justify the implementation of a fetal protection policy. *Id.* (White, J., concurring).

[90] *Johnson Controls*, 111 S. Ct. at 1213 (White, J., concurring). The concurrence also stated that past case law confirmed the relevancy of cost considerations in analyzing whether a normal business operation reasonably depended upon a discriminatory employment policy. *Id.* (White, J., concurring).

[91] *Id.* at 1213-14 (White, J., concurring). Justice White stressed that assuming, arguendo, that the BFOQ standard was different for pregnancy-based situations, the female employee's work capabilities would differ from that of a male employee if her job performance imposed significant safety and liability risks. *Id.* at 1214 n.7 (White, J., concurring).

[92] *Id.* at 1213-14 (White, J., concurring). The concurrence argued that the Pregnancy Discrimination Act did not restrict the scope of the BFOQ defense. *Id.* at 1213. Rather, it simply served to insure that pregnancy-based discriminatory treatment corresponded to the principles of Title VII. *Id.* (White, J., concurring).

[93] *See supra* notes 18-21, 53 and accompanying text.

[94] *See supra* notes 47-51.

[95] *See supra* note 49.

cult, if not impossible, to establish a BFOQ defense to justify a fetal protection policy, *Johnson Controls* will force many employers to abandon such policies entirely.[96] It is important to note, however, that the Supreme Court's decision in *Johnson Controls* centered primarily around the use of "fertility" as a means of excluding women from certain jobs.[97] Considering that the Court continues to acknowledge the legality of exclusionary pregnancy policies that are based upon safety or job performance reasons, it is conceivable that employers may continue to enforce their fetal safety concerns upon pregnant employees through such narrowly-tailored pregnancy policies.[98] Nevertheless, the future for gender equality in the workforce following the *Johnson Controls* decision looks extremely promising.[99]

Robert E. McDade, Jr.

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[96] *See supra* notes 59, 70.
[97] *See supra* note 84.
[98] *See supra* notes 52-53 and accompanying text.
[99] *See supra* note 83.

Criminal Procedure—Constitutional Law—Fifth Amendment Right to Counsel Does Not Terminate Upon Consultation With Counsel

Petitioner[1] appealed from a ruling[2] wherein the Circuit Court of Lowndes County, Mississippi, denied a motion to suppress a confession.[3] Petitioner contended that interrogation procedures followed[4] were unconstitutional.[5] However, the jury returned a verdict against the petitioner on both charges.[6] The Mississippi Supreme Court upheld the conviction on appeal.[7] On a writ of certiorari, the United

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[1] After escaping from a county jail in Mississippi, petitioner Robert Minnick and fellow prisoner, James Dyess, burglarized a mobile home in search of weapons. Minnick v. Mississippi, 111 S. Ct. 486, 488 (1990). When the owner, Ellis Thomas, accompanied by two others, returned to the trailer, the burglars shot and killed Thomas and one other. *Id.* California officials apprehended Minnick approximately four months later. *Id.*

[2] *Minnick*, 111 S. Ct. at 486. The State of Mississippi, respondent, prosecuted Minnick on two counts of capital murder. *Id.* at 489. A jury convicted petitioner and sentenced him to death. *Id.*

[3] *Id.* Petitioner moved to suppress all statements given to police officers or Federal Bureau of Investigation (F.B.I.) officers. *Id.* Petitioner alleged that after he requested and consulted with counsel, police officers re-initiated interrogation without counsel present and, therefore, violated his fifth and sixth amendment rights. *Id.* However, the court disagreed with petitioner and ruled that his confession made to a deputy sheriff was admissible into evidence on the grounds that Minnick volunteered the information. *Id.* at 493 (Scalia, J., dissenting).

[4] *Id.* at 488. In August 1986, California police officers arrested Minnick and held him in the San Diego County Jail. *Id.* The day following the arrest, two F.B.I. officers questioned Minnick. *Id.* The F.B.I. report indicated that officers read Minnick his *Miranda* rights, that he understood his rights, but that he refused to sign any forms to waive his rights. *Id.* After Minnick confessed to the officers about some events surrounding the night of the murders, he refused to continue without a lawyer present. *Id.* During the next few days, an appointed attorney met with Minnick several times. *Id.* On August 25, Denham, a deputy sheriff from Mississippi, arrived in California to question Minnick. *Id.* at 489. Once again, police officers instructed Minnick as to his rights and Minnick refused to sign a rights waiver form. *Id.* During a formal interview that police officers compelled Minnick to attend without counsel, Minnick told Denham that Dyess shot one of the victims and then forced Minnick at gunpoint to shoot the second. *Id.*

[5] *Id.* The fifth amendment protects a suspect from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The sixth amendment guarantees a suspect's right to "assistance of counsel." U.S. Const. amend. VI.

[6] *Minnick*, 111 S. Ct. at 486. A jury in the Circuit Court of Lowndes County, Mississippi, convicted petitioner of two counts of capital murder. *Id.*

[7] *Id.* at 489. Pursuant to rules previously set forth by the United States Supreme Court, the Mississippi Supreme Court held that the state satisfied a suspect's fifth

States Supreme Court, *held*, reversed and remanded.[8] Where a suspect requested counsel, subsequent re-initiation of interrogation by police without counsel present, whether or not suspect had met with counsel, violated suspect's fifth amendment right to counsel. *Minnick v. Mississippi*, 111 S. Ct. 486 (1990).

Law surrounding admissibility of confessions originated out of the English common law doctrine of trustworthiness.[9] Although early United States Supreme Court cases reviewing federal criminal convictions utilized the doctrine of trustworthiness, they found confessions inadmissible on the ground that they were involuntary.[10] The Court applied this voluntariness standard to a state criminal case for the first

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amendment right to counsel once counsel had been "made available" to him. *Id.* at 488. The court further rejected petitioner's sixth amendment claim on the ground that he waived his right to counsel when he spoke to Denham. *Id.* at 489.

[8] *Id.* Without considering the sixth amendment claim, the United States Supreme Court held that the fifth amendment right to counsel did not terminate upon consultation with counsel. *Id.* The requirement that counsel be "made available" to the accused referred not only to the opportunity to confer with an attorney, but to have an attorney present during subsequent interrogations. *Id.* at 490. The Court emphasized in its holding that this interpretation was essential to maintain the integrity of the fifth amendment right to counsel. *Id.* at 492.

[9] D. NISSMAN, E. HAGEN & P. BROOKS, LAW OF CONFESSIONS, § 1:2 (1985). The earliest origins of the voluntariness principle are found in Roman-cannon law and the German code of criminal procedure, The Constitutio Criminalis Carolina of 1532. Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59, 93 (1989). The doctrine did not find its way into the English courts until the eighteenth century. King v. Warickshall, 1 Leach 263, 263-64, 168 Eng. Rep. 234, 234-35 (K.B. 1783); *see* Rosenberg & Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 957-59 (1988) (English courts recognize voluntariness principle). *See generally* 3 J. WIGMORE, WIGMORE ON EVIDENCE § 819 (Chadbourne rev. 1970) (confessions during second half of 1700s); Benner, *supra*, at 101 (development of English common law voluntariness rule from the twelfth century). In *Warickshall*, the English court concluded that "a confession forced from the mind by the flattery of hope, or by the torture of fear" was untrustworthy and should not be used in determining guilt. *Warickshall*, 168 Eng. Rep. at 235. The *Warickshall* court stressed that a confession given freely and voluntarily deserved the highest credit. *Id.* Shortly thereafter, American courts adopted the *Warickshall* trustworthy test. Commonwealth v. Dillon, 4 U.S. (4 Dall.) 116, 117-18 (1792).

[10] Hopt v. Utah, 110 U.S. 574, 585 (1883). In its first confession case, the United States Supreme Court found a confession inadmissible on the ground that it was involuntary. *Id.*; *see* Pierce v. United States, 160 U.S. 355, 357 (1896) (confession admissible unless extorted by inducement or threat); Wilson v. United States, 162 U.S. 613, 623 (1896) ("true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort"); Sparf v. United States, 156 U.S. 51, 55 (1895) (confessions of imprisoned person admissible if they appeared voluntary).

time in *Brown v. Mississippi*.[11] A Kemper County, Mississippi, deputy sheriff arrested Brown and two other negroes for the murder of a farmer.[12] The deputy, accompanied by the jailer and other white men, ordered the prisoners to strip and bend over chairs while they harshly beat the prisoners with leather belts.[13] The deputy sheriff led the prisoners to believe that the whippings would continue until they confessed.[14] As the whippings progressed, the prisoners acceded to the demands of their torturers.[15] Following a trial judge's ruling that the confessions were admissible, the defendants testified at trial on their own behalf as to the savage beatings, but the trial court sentenced them to death.[16] Brown argued that since police obtained his confession to murder[17] by use of physical torture, allowing it to be admissible into evidence violated both the fifth amendment prohibition of self-incrimination[18] and the fourteenth amendment due process clause.[19]

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[11] 297 U.S. 278 (1936).

[12] *Brown*, 297 U.S. at 281. Police officials discovered the murder of Raymond Stuart at approximately one o'clock on March 30, 1934. *Id.*

[13] *Id.* No one disputed the fact that the white men brutally beat the negroes. *Id.* The negroes demonstrated their rope burns and whipping marks at trial. *Id.* at 283.

[14] *Id.* at 282. The white men demanded the negroes confess to each and every detail of their version of the murder. *Id.*

[15] *Id.* As the whippings continued, the negroes adjusted their confessions to meet the demands of their torturers. *Id.*

[16] *Id.* at 284. The negroes declined assistance of counsel on the ground that counsel provided no help to them. *Id.*

[17] *Brown*, 297 U.S. at 281-82. The Circuit Court of Kemper County, Mississippi, convicted petitioner on one count of capital murder. *Id.* at 279. On appeal, the Mississippi Supreme Court upheld the conviction. *Id.* at 280. On a writ of certiorari, the United States Supreme Court reversed. *Id.*

[18] *Id.* Brown alleged that use of a tortured confession violated his right against self-incrimination guaranteed by the fifth amendment. *Id.* The Supreme Court had accepted this argument in 1897. Bram v. United States, 168 U.S. 532, 532 (1897); *see also* United States v. Carignan, 342 U.S. 36, 41 (1951) (confession valid if made freely and voluntarily). However, the Supreme Court also held on numerous occasions that the states were not subjected to the fifth amendment. Twining v. New Jersey, 211 U.S. 78, 127 (1908). "Therefore, the *Brown* decision had to be based on some ground other than the strict privilege against self-incrimination." Israel, *Police Interrogation and the Supreme Court-The Latest Round*, in A NEW LOOK AT CONFESSIONS: ESCOBEDO - THE SECOND ROUND 20 (B. George, Jr., ed. 1967).

[19] *Brown*, 297 U.S. at 280. The fourteenth amendment prevents the states from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court previously applied the due process clause to intervene in other state criminal cases. Mooney v. Holohan, 294 U.S. 103, 112 (1935); *see* Powell v. Alabama, 287 U.S. 45, 73 (1932) (right of accused to have counsel is fundamental right guaranteed by constitution); Moore v. Dempsey, 261 U.S. 86, 90 (1923) (trial for murder in state court where accused was rushed to conviction to appease mob violated due pro-

Having previously held the fifth amendment inapplicable to the states,[20] the Court concluded that use of a tortured confession violated a federal due process right.[21] Therefore, in addition to state common law standards of voluntariness, federal due process standards now governed confession law in the states.[22]

Over the next thirty years, the Supreme Court utilized the fourteenth amendment due process clause to refine the doctrine of voluntariness.[23] The decision of *Malloy v. Hogan*[24] marked the beginning of

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cess of law).

[20] *Twining*, 211 U.S. at 78. The Court declared the right against self-incrimination not a fundamental right absorbed by the fourteenth amendment due process clause and made applicable to the states. *Id.*; *see* Cohen v. Hurley, 366 U.S. 117, 125-27 (1961) (fourteenth amendment did not give petitioner federal constitutional right against self-incrimination state proceedings).

[21] *Brown*, 297 U.S. at 286. "Due process of law" limited state policy concerning confessions obtained through physical torture. *Id.*; *see* Moran v. Burbine, 475 U.S. 412, 432-34 (1986) (police deception during interrogation so offensive as to be condemned); Ward v. Texas, 316 U.S. 547, 548 (1942) (conviction reversed; ignorant negro taken from home, driven for three days from county to county, placed in jail, whipped and beaten during continuous questioning until giving confession).

[22] *Brown*, 297 U.S. at 286. The rule disallowed the states from utilizing less stringent standards required under federal due process precedent. WIGMORE, *supra* note 9, at § 820(d).

[23] Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 49-52 (1965). The Court expanded the rule in *Brown* to include psychologically coerced confessions. Chambers v. Florida, 309 U.S. 227, 241 (1940). Subsequently, the Court required less stringent methods of coercion to find confessions inadmissible. *See* Haynes v. Washington, 373 U.S. 503, 506 (1963) (conviction reversed; accused held incommunicado for sixteen hours and told he could not call his wife until he signed confession); Lynumn v. Illinois, 372 U.S. 528, 530 (1963) (conviction reversed; promises of leniency if accused would cooperate with elicited confession); Spano v. New York, 360 U.S. 315, 315-19 (1959) (conviction reversed when confession of twenty-five-year-old foreign man with junior high education was elicited by policeman friend who made misrepresentations to him); Payne v. Arkansas, 356 U.S. 560, 561-63 (1958) (conviction reversed when accused, mentally slow nineteen-year-old negro with fifth grade education, was held incommunicado for three days with little food by police officers to obtain confession); Leyra v. Denno, 347 U.S. 556, 556-58 (1954) (conviction reversed when confession obtained by state-employed psychiatrist posing as doctor to treat sinus condition of accused); Watts v. Indiana, 338 U.S. 49, 49-51 (1949) (conviction reversed when accused held in solitary confinement for six days with little food and sleep but persistent questioning); White v. Texas, 310 U.S. 530, 530-33 (1940) (conviction reversed when illiterate farmhand held incommunicado for six days and questioned in woods confessed to crime). The final test of voluntariness presented into modern confession law considered the totality of the circumstances. Culombe v. Connecticut, 367 U.S. 568, 601-02 (1961). The Court in *Culombe* suggested that courts consider all surrounding circumstances of a confession, including interrogation techniques and mentality of the accused, to determine its admissibility. *Id.*; *cf.* Rogers v. Richmond, 365 U.S. 534, 541-42

the Court's present method for evaluating admissibility of confessions.[25] During a state gambling inquiry, the Superior Court of Hartford, Connecticut, ordered Malloy, previously convicted of pool-selling, to testify about the leader of the pool-selling operation.[26] Malloy refused to answer on the ground that "it may tend to incriminate me."[27] The court held Malloy in contempt, and committed him to prison until he agreed to answer questions.[28] Both the Superior Court of Hartford and the Connecticut Supreme Court of Error denied Malloy's application for writ of habeas corpus on the ground that self-incrimination was not available to state criminal defendants.[29] Because the states employed fifth amendment federal standards in state confession cases since *Brown*,[30] the Supreme Court merged the confession rule with fifth amendment prohibition of self-incrimination,[31] and made the fifth amendment applicable to the states.[32] The Court reasoned that since

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(1961) (truth or falsity of confession had no bearing on determination of voluntariness).

[24] 378 U.S. 1 (1964).

[25] *Malloy*, 378 U.S. at 1. For the first time, the Court established federal standards applicable to all state criminal defendants. *Id.*

[26] *Id.* Hartford, Connecticut, police arrested Malloy during a gambling raid. *Id.* Malloy pleaded guilty to the misdemeanor crime of pool-selling. *Id.* The court sentenced him to one year in jail and a five hundred dollar fine, but later shortened the sentence to ninety days in jail and a two-year probation. *Id.*

[27] *Id.* at 3. Malloy refused to answer questions concerning his arrest and conviction. *Id.*

[28] *Id.* The Court held that a court could not unnecessarily detain suspects in an attempt to compel answers to questions. *Id.*

[29] *Id.* The Court further stated that the fourteenth amendment awarded Malloy no protection, and that he had not properly invoked Connecticut's constitutional privilege. *Id.*

[30] *Malloy*, 378 U.S. at 6-7. The Court stated the test of *Brown* was "soon abandoned" and replaced by the standard established for federal criminal trials in 1897. *Id.* (quoting Lisbena v. California, 314 U.S. 219, 240 (1941)). That test evaluated the confession as being "free and voluntary." *Malloy*, 378 U.S. at 7 (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)). Factors considered included violence, threats of violence, or any direct or implied promises used to elicit a confession. *Malloy*, 378 U.S. at 7; *see* Smith v. United States, 348 U.S. 147, 150 (1954) (confession not allowed when implied promise of immunity from government official elicited confession); Wan v. United States, 266 U.S. 1, 14 (1924) (seven-day interrogation violated *Bram* voluntariness test).

[31] *Malloy*, 378 U.S. at 6. The fifth amendment protects a suspect from being "compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[32] *Malloy*, 378 U.S. at 5-8. The Court relied on the reasoning of prior decisions making the first, fourth, and sixth amendments applicable to the states. *Id.* The Court concluded that the fourteenth amendment secured against state invasion what the fifth amendment secured against federal invasion - the privilege against compulsory self-incrimination. *Id.*; *see* Wainwright v. Greenfield, 474 U.S. 284, 295 (1986) (use of defendant's post arrest, post *Miranda* warning silence against him violated due process); *cf.*

previous rulings demonstrated a fourteenth amendment prohibition of compulsory incrimination, the Court would not admit any confessions extracted by threats, implied promises, or imprisonment.[33]

In the same term, the Court utilized a different constitutional principle to protect suspects in *Escobedo v. Illinois*.[34] In *Escobedo*, police arrested petitioner for the murder of his brother-in-law.[35] During a lengthy interrogation, officials ignored Escobedo's request for counsel[36] without warning him of his right to remain silent.[37] Instead, the police officers confronted Escobedo with an alleged accomplice who accused Escobedo of having perpetrated the murder.[38] At this time, Escobedo admitted to having knowledge of the crime, which led to additional admissions that became evidence sufficient to convict him.[39] The Court did not rely on the voluntariness rationale to reverse Escobedo's conviction.[40] Instead, the Court held that a suspect's sixth amendment right to counsel[41] was violated when police officials denied him assis-

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Cage v. Louisiana, 111 S. Ct. 328, 334 (1991) (due process clause protected state criminal defendant except upon proof beyond reasonable doubt every incriminating fact necessary to convict).

[33] *Malloy*, 378 U.S. at 8. The fourteenth amendment's due process clause prohibited states from obtaining confessions through physical or psychological coercion. *Id.*; *see* Malinski v. New York, 324 U.S. 401, 404 (1945) (conviction reversed on due process grounds because confession of murder obtained by police use of physical beatings).

[34] 378 U.S. 478 (1964).

[35] *Escobedo*, 378 U.S. at 479. On January 19, 1960, an unknown assailant shot and killed Escobedo's brother-in-law. *Id.* Later that night, police officials arrested Escobedo. *Id.* Escobedo did not answer any questions before police released him. *Id.* On January 30, police officials again arrested Escobedo and his sister pursuant to information obtained from Escobedo's accomplice. *Id.*

[36] *Id.* at 480-83. Petitioner's attorney arrived at the police station shortly after Escobedo. *Id.* However, police officers denied his attorney's request to see Escobedo, and also ignored Escobedo's continuing requests to consult with an attorney. *Id.*

[37] *Id.* During interrogation, police did not allow Escobedo access to his attorney, nor did they warn him of his right to remain silent. *Id.*; *see* Davis v. North Carolina, 384 U.S. 737, 740-41 (1966) (voluntariness of confession questioned when defendant not informed of right of silence).

[38] *Escobedo*, 378 U.S. at 479. Earlier that day, Benedict DiGerlando, while in police custody, told police that Escobedo shot the victim. *Id.* Police officials then apprehended Escobedo. *Id.*

[39] *Id.* at 483. When Escobedo confronted DiGerlando about the accusation, Escobedo denied shooting his brother-in-law and blamed DiGerlando for the murder. *Id.*

[40] *Id.* at 480-83. *See generally*, Dripps, *Supreme Court Review: Forward: Against Police Interrogation - And The Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 699-734 (1988) (various forms of voluntariness rationale still around today).

[41] *Escobedo*, 378 U.S. at 487. The Constitution entitles every person to the right to counsel at trial. *Id.* (quoting Gideon v. Wainwright, 372 U.S. 335, 339 (1963)). To deny

tance of counsel[42] during custodial interrogation,[43] taking the position that no meaningful distinction could be drawn between interrogation before or after indictment.[44] In conclusion, the Court stated that no criminal justice system based upon a suspect's ignorance of his constitutional rights deserved preservation.[45]

The impact of the *Escobedo* decision produced much diversity in views among the courts.[46] Therefore, the Court clarified its position two years later in *Miranda v. Arizona*.[47] In *Miranda*, the Court consolidated four state confession cases.[48] In each case, the defendants made incriminating confessions during interrogation, and police officials did not warn defendants of their right to counsel or right against self-in-

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counsel at pre-trial proceedings would make the trial "no more than an appeal from interrogation." *Id.* at 488; *see also* United States v. Gouveia, 476 U.S. 180, 193 (1983) (sixth amendment right to counsel attached before formal charges are filed); Brewer v. Williams, 430 U.S. 387, 398 (1977) (right to counsel attached at onset of adversary judicial proceedings).

[42] *Escobedo*, 378 U.S. at 481. Upon denial of Escobedo's request for counsel, the police officials told petitioner that they had convincing evidence supporting his involvement in the crime. *Id.* at 485. Because the interrogation shifted from inquisitorial to accusatorial in nature, the Court reasoned that Escobedo needed the "guided hand of counsel" to protect his constitutional rights. *Id.* at 486 (quoting Powell v. Alabama, 287 U.S. 45, 63 (1924)); *see* Darwin v. Connecticut, 391 U.S. 346, 349 (1967) (police denial of accused's right to counsel during interrogation inferred involuntary confession).

[43] *Escobedo*, 378 U.S. at 480-83. During the investigation, an officer who was a friend of Escobedo's questioned him. *Id.* Escobedo testified that this officer assured him he would be able to go home if he implicated another man in the murder. *Id.* At this point, Escobedo admitted to having knowledge of the crime. *Id.*

[44] *Id.* at 487. The Court previously established a right to counsel at trial and after indictment. Massiah v. United States, 377 U.S. 201, 204 (1964) (conviction reversed when defendant, on bail after indictment, confessed in absence of counsel).

[45] *Escobedo*, 378 U.S. at 490. The Court reasoned that individual constitutional rights deserved the highest degree of governmental protection. *Id.*

[46] WIGMORE, *supra* note 9, at § 826a. Many courts limited *Escobedo* to its facts. *See* Edwards v. Holman, 342 F.2d 679, 683-84 (5th Cir. 1965) (state criminal defendant who had prior convictions and who had not been denied assistance of counsel was not entitled to federal habeas corpus relief on the ground that he should have been provided assistance of counsel as soon as he became a murder suspect), *cert. denied*, 384 U.S. 1017 (1966). *But cf.* United States *ex rel.* Russo v. New Jersey, 351 F.2d 429, 436-37 (3d Cir. 1965) (ample reading of *Escobedo*), *vacated*, 384 U.S. 889 (1966), *cert. denied*, 384 U.S. 1012 (1966).

[47] 384 U.S. 436 (1966).

[48] *Miranda*, 384 U.S. at 491. The Court wrote its opinion without specific concentration on the facts of each case. *Id. See generally* Kamisar, Miranda: *The Case, the Man and the Players* (Book Review), 82 MICH. L. REV. 1074, 1074 (1984) (court combined *Miranda* with three companion cases).

crimination.[49] In *Miranda*, the Court held that custodial interrogation[50] was inherently coercive,[51] and that police officials who employ it to secure a confession bear the burden of proving that they gave proper warnings[52] and that the suspect validly waived the right of counsel and

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[49] *Miranda*, 384 U.S. at 491. In the first case, police officials arrested petitioner at his home and took him to the Phoenix police station where the complaining witness identified him. *Id.* Police officers interrogated petitioner, and two hours later emerged from the interrogation room with a signed confession. *Id.* at 491-92. Police officials admitted that they did not inform petitioner of his right to remain silent or his right to have an attorney present. *Id.* The Arizona Supreme Court ruled the confession admissible because of the fact that Miranda had no attorney present did not imply an involuntary confession. *Id.* In the second case, police officials picked up the petitioner in connection with a robbery and transported him to a detective squad headquarters. *Id.* at 493. Police officials then took petitioner to another detective headquarters where he confessed after interrogation. *Id.* Officials then arrested him. *Id.* After eight hours, petitioner gave a written statement to a prosecutor. *Id.* In the third case, Kansas City police officers arrested petitioner in connection with a robbery. *Id.* at 494. The F.B.I. indicated that he was wanted in California on a felony charge. *Id.* After being placed in a lineup and booked, police interrogated petitioner all through the night. *Id.* The following day, F.B.I. officers interrogated petitioner for at least two more hours. *Id.* at 495. After two hours, petitioner signed two confessions. *Id.* In the fourth case, police officials arrested petitioner at his home where they found robbery proceeds. *Id.* at 497. Petitioner remained in jail over five days while police interrogated him. *Id.* During the ninth interrogation, petitioner confessed. *Id.*

[50] *Id.* at 477-79. The Court stated that when police officials conducted a custodial interrogation or otherwise deprived a suspect of his freedom in any significant way, they denied the suspect his fifth amendment privilege against self-incrimination. *Id.*; *see* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (*Miranda* protection extended to any words or actions by police likely to elicit incriminating response); *see also* Arizona v. Mauro, 481 U.S. 520, 527 (1987) (recording conversation with wife is not interrogation within *Innis* and *Miranda*); South Dakota v. Neville, 459 U.S. 553, 566 (1983) (police asking if suspect will take blood-alcohol level test not considered interrogation).

[51] *Miranda*, 384 U.S. at 491. Interrogation procedures practiced by law enforcement officers inherently intimidated suspects. *Id.* Police had conducted most interrogations incommunicado. *Id.* at 445. For this reason, the Court concluded that police officials purposefully created an environment to subjugate the suspect to the will of his examiner. *Id.* at 457. While the Court may not have found all confessions made in this environment involuntary in traditional terms, its concern for safeguards to protect a suspect's constitutional right against self-incrimination compelled the present rule. *Id.*

[52] *Id.* at 479. The Court set forth a group of warnings required to be given to any suspect in custody prior to questioning. *Id.*; *see also* California v. Prysock, 453 U.S. 355, 361 (1981) (does not matter what order police issued warnings to suspect as long as advised of constitutional rights). *But see* New York v. Quarles, 467 U.S. 649, 654-55 (1984) (concern for public safety paramount to literal language of *Miranda*'s prophylactic rule); Harris v. New York, 401 U.S. 222, 226 (1971) (defendant cannot assert *Miranda* protection as defense to perjury in impeachment proceedings). The law enforcement officers must warn a suspect of his right to remain silent, that anything he says could be used against him in a court of law, and that if he could not afford an attorney the court would

right of silence.[53] The Court noted the increased proficiency of police officials at obtaining confessions through psychological coercion[54] and concluded that the fifth amendment privilege[55] encompassed the right to have counsel present during any custodial questioning if the suspect so desired.[56] The Court stressed that any statements taken in violation

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appoint one for him upon his request prior to questioning. *Miranda*, 348 U.S. at 479; *cf.* Duckworth v. Egan, 492 U.S. 195, 202-05 (1989) (warnings need not take on exact form prescribed in *Miranda*). If the accused requested counsel, interrogation must cease until an attorney is present. *Miranda*, 348 U.S. at 474; *see* Michigan v. Mosley, 423 U.S. 96, 104 n.10 (1975) (distinguished between right of silence and right of counsel; interrogation must cease upon request for counsel), *cert. denied*, 434 U.S. 861 (1977) . *But see* Fare v. Michael C., 442 U.S. 707, 719 (1979) (denial of juvenile's request for probation officer held not to be violation of fifth amendment). *See generally* Note, *Pretrial Rights to Counsel Under the Fifth and Sixth Amendments: A Distinction Without a Difference*, 12 LOY. U. CHI. L.J. 79, 90-91 (1980) (authored by Maureen Martin) (effect of *Miranda* on pre-trial rights).

[53] *Miranda*, 384 U.S. at 479. The Court stated that after the suspect received warnings about his constitutional rights to silence and counsel, he may "voluntarily, knowingly and intelligently" waive these rights and agree to answer any questions. *Id.*; *see* North Carolina v. Butler, 441 U.S. 369, 374-75 (1979) (waiver of constitutional right of counsel implied from surrounding circumstances). *But see* Colorado v. Connelly, 479 U.S. 157, 169 (1986) (state's burden of proof for waiver only preponderance of evidence).

[54] *Miranda*, 384 U.S. at 448-58. The Court analyzed common police interrogation practices as described in various police manuals. *Id.*; *see* L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT 88-90 (1924) (legality of police officers conducting third-degree interrogations). The manuals noted that the essential element of successful interrogation was privacy, along with persistent questioning. *Miranda*, 384 U.S. at 449-51. The Court concluded that use of these techniques to secure confessions conflicted with the privilege against self-incrimination. *Id.* at 457-58; *see* Pennsylvania v. Muniz, 110 S. Ct. 2638, 2643 (1990) (privilege against self-incrimination does not protect accused from being compelled to produce real or physical evidence); Ashcraft v. Tennessee, 327 U.S. 274, 276-79 (1945) (conviction reversed when defendant confessed to knowledge of wife's murder after being continuously questioned in county jail for thirty-six hours without food or water). *See generally* Smith, *The Threshold Question in Applying* Miranda*: What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699, 704-11 (1974) (pressures inherent in custodial interrogation required fifth amendment protection).

[55] *Miranda*, 384 U.S. at 458-66. The Court traced the history of the privilege against self-incrimination back to seventeenth century England. *Id.* Through an examination of early American court decisions, the Court concluded that "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Id.* at 460. To protect a suspect's right to choose between silence and speech, the Court stated that there must exist a right to have counsel present during custodial interrogation. *Id.* at 469. *See generally* Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1595-1602 (1988) (authored by Daniel Sasaki) (protecting individual rights and facilitating police procedure in eliciting confessions).

[56] *Miranda*, 384 U.S. at 474. The Court stated that every police station was not required to have an attorney present at all times. *Id.* The Court's ruling required police

of a suspect's rights must be excluded from evidence.[57] Thus, the Court's emphasis shifted from an analysis of a confession to the presence of counsel during interrogation.[58]

The Court expanded the rights of suspects a step further in *Edwards v. Arizona*.[59] After being arrested on state criminal charges and informed of his *Miranda* rights, Edwards requested assistance of counsel, at which point interrogation ceased.[60] The next morning, although Edwards was still without counsel, the police returned and began questioning him again.[61] Edwards answered the questions and incriminated himself.[62] In *Edwards*, the Court first held that a suspect's waiver of counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a known right."[63] The Court then

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officials to advise a suspect of his rights, and to respect the decision of the suspect who invoked his rights by ceasing interrogation. *Id. See generally* Berger, *Compromise and Continuity*: Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1036-42 (1988) (unconstitutional to elicit confessions by deceit, pressure tactics, and police overreaching).

[57] *Miranda*, 384 U.S. at 479. *But see* Oregon v. Elstad, 470 U.S. 298, 304-09 (1985) (free response given to unwarned, non-coercive question while suspect in custody was admissible). The Court reasoned that it was the inherently compelling atmosphere of police interrogations that prompted the Court to require warnings as to suspects' rights. *Miranda*, 384 U.S. at 477-79. Therefore, the Court concluded that confessions obtained outside interrogation or during a discussion which the suspect initiated were not bound by the Court's ruling. *Id.*

[58] *Miranda*, 384 U.S. at 465-66. The Court did not look to the traditional way of determining voluntariness. *Id. See generally* Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867-78 (1981) (Court not satisfied with voluntariness rule as applied to admissibility of confessions).

[59] 451 U.S. 477 (1981).

[60] *Edwards*, 451 U.S. at 478-79. Police arrested Edwards on charges of robbery, burglary, and first degree murder. *Id.* at 478. Edwards asserted his right to remain silent and requested an attorney, and the interrogation immediately ceased. *Id.* at 479.

[61] *Id.* Police officials again warned Edwards of his *Miranda* rights prior to beginning the second interrogation. *Id.*

[62] *Id.* Edwards moved to suppress his statements made to police on the ground that police violated his *Miranda* rights. *Id.* The trial court denied the motion. *Id.* at 480. The Arizona Supreme Court upheld the trial court's admission of the confession on the grounds that although Edwards had invoked his right to counsel during the first interrogation, he had waived his rights during the second interrogation. *Id.* The United States Supreme Court, however, held that although Edwards responded voluntarily to police officials during the second interrogation, he did not knowingly and intelligently waive his right to counsel. *Id.* at 483.

[63] *Id.* at 482. The Court concluded that a valid waiver cannot be established by showing that a suspect merely responded to police-initiated interrogation. *Id.* at 484. The Court identified circumstances in which courts could deem suspects to have waived or partially waived their right to counsel at the onset of interrogation. *Id.* at 486; *see* Colo-

held that once a suspect requested counsel, the police must cease all interrogation until counsel was present pursuant to a fifth amendment privilege against self-incrimination.[64] *Edwards* created a per se rule that once a suspect requested counsel, any statements subsequently taken were inadmissible unless the suspect validly waived his fifth amendment right to counsel.[65]

The Court examined the importance of the *Edwards* prophylactic rule in *Arizona v. Roberson*.[66] In *Roberson*, the state requested the Court to make an exception to the *Edwards* rule when police officials re-initiated questioning concerning an offense unrelated to the subject of initial interrogation.[67] However, the Court reasoned that the bright-line prophylactic *Edwards* rule[68] benefited both the accused and the

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rado v. Spring, 479 U.S. 564, 573-75 (1987) (suspect understood he had right to counsel, but knowingly and intelligently confessed to crime without counsel).

[64] *Edwards*, 451 U.S. at 481-82. The *Edwards* Court noted that a suspect in custody may waive *Miranda* rights and respond to questioning, but established that "additional safeguards" were needed when a suspect requested counsel. *Id.* at 484. Therefore, the Court concluded that once a suspect requested counsel, subsequent waiver of that right before counsel had been made available to him was presumed invalid if secured pursuant to police-initiated discussion. *Id.*; *see* Michigan v. Jackson, 475 U.S. 625, 634 (1986) (supported "bright-line" quality of *Edwards* rule because it established clear guidelines for all to follow); Solem v. Stumes, 465 U.S. 638, 646 (1984) (bright-line rule established to guard pre-existing constitutional rights of silence and assistance of counsel); *see also* Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (plurality opinion) (bright-line rule protected suspect from police badgering); Starke, *United States Supreme Court Broadens the* Miranda *Ruling as to the Limits on Police Interrogation*, 65 AUSTL. L.J. 243, 243-45 (1991) (suspect rights broadened further).

[65] *Edwards*, 451 U.S. at 484. The Court reasoned that to allow police officials to re-initiate questioning before a suspect's counsel had been made available to him was "inconsistent with *Miranda* and its progeny." *Id.* at 485; *see* Patterson v. Illinois, 487 U.S. 285, 291 (1988) (must protect suspect's choice to deal with police through counsel); Shea v. Louisiana, 470 U.S. 51, 52 (1985) (use of confession obtained by police-initiated interrogation without counsel present after request had been made for attorney violated constitutional rights). *See generally* Dripps, Miranda *After 25 Years: Alive and Well?*, TRIAL, March 1991, at 13, 14-15 (*Miranda* decision still active as shown by recent extension).

[66] 486 U.S. 675 (1988).

[67] *Roberson*, 486 U.S. at 677. The state argued that the Court should limit Roberson's request for counsel to the subject matter of the first interrogation from which Roberson requested counsel. *Id.* at 683-85; *see* Connecticut v. Barrett, 479 U.S. 523, 523 (1987) (suspect's limited request for counsel provided only limited rights). However, the *Roberson* Court concluded that not only did Roberson request full assistance of counsel, but that the presumption that a suspect "considers himself unable to deal with the pressures of custodial interrogation" by requesting counsel did not extinguish because police officials questioned the suspect about a separate investigation. *Roberson*, 486 U.S. at 683.

[68] *Roberson*, 486 U.S. at 681. The *Edwards* rule provided "clear and unequivocal

state.[69] The rule protected suspects from the "inherently compelling pressures" of custodial interrogation by creating a presumption that any waiver following a request for counsel at police-initiated questioning was coercive and, therefore, involuntary.[70] Furthermore, the rule provided clear and unequivocal guidelines that govern police officials, prosecutors, and courts.[71] The Court concluded that once a suspect requested counsel, any statements subsequently taken were presumed involuntary unless the suspect validly waived his fifth amendment right to counsel.[72]

In the instant case, the United States Supreme Court stated that since the fifth amendment guaranteed protection against self-incrimination, law enforcement officials must terminate interrogation of a suspect upon a request for assistance of counsel.[73] The Court further reasoned that since a suspect requested counsel, he then possessed the right to have counsel present at all subsequent police-initiated interrogations.[74] Since the criminal justice system demanded recognition of individual ability to waive constitutional rights or admit guilt,[75] the Court found that these responsibilities would only be effective when there were "particular and systemic assurances" of the validity of con-

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guidelines" to counteract the pressures inherent in custodial interrogations. *Id.* at 682; *see* Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (*Edwards*' prophylactic rule excluded police-initiated statements taken during custodial interrogation).

[69] *Roberson*, 486 U.S. at 681. *See generally* Comment, *Constitutional Law - The Rights of Criminal Suspects in Subsequent Custodial Interrogations* - Arizona v. Roberson, 108 S. Ct. 2093 (1988), 23 SUFFOLK U.L. REV. 111, 115-16 (1989) (authored by John C. Fitzpatrick) (Court balanced interests of state and suspect).

[70] *Roberson*, 486 U.S. at 681. The Court found no logical reason for distinguishing between custodial pressures present at an interrogation surrounding a separate offense. *Id.* at 682-85.

[71] *Id.* at 682. The Court concluded that strict guidelines were necessary for proper law enforcement. *Id.* at 681-82.

[72] *Id.* at 681. The Court stated that there was no logical reason for granting an exception to the *Edwards* rule when applied to questioning about an unrelated offense because the same custodial pressures existed. *Id.* at 682.

[73] Minnick v. Mississippi, 111 S. Ct. 486, 489 (1990). The Court reasoned that assistance of counsel counteracted compulsion inherent in custodial interrogation. *Id.*

[74] *Id.* at 492. The Court concluded that a suspect could waive his right to counsel when he initiated the discussion. *Id.*

[75] *Id.* at 491. The Court emphasized that consultation with an attorney did not relieve a suspect in custody from coercive attempts by officials to induce him to waive his constitutional rights, nor did it ensure an adequate understanding of his rights. *Id.* Furthermore, the Court stressed the importance of conserving judicial resources which would be allocated toward making determinations of voluntariness, as well as establishing strict judicial guidelines for law enforcement officials. *Id.* at 492.

fessions.[76] Therefore, the Court concluded that since fifth amendment protection against self-incrimination did not terminate when a suspect consulted with an attorney, re-initiation of police-initiated interrogation in counsel's absence violated suspect's fifth amendment right to counsel.[77]

A dissenting opinion, authored by Justice Scalia, stated that since the Court created the previously adopted prophylactic rule, the Court must justify an expansion.[78] Scalia reasoned that since the Court previously created an irrebuttable presumption that any confessions elicited by police resulted from a suspect's ignorance of his constitutional rights or police coercion,[79] the Court was unjustified in extending the rule to situations where the suspect previously consulted with counsel.[80] Since guidelines previously established by the Court governed waiver of constitutional rights, Scalia concluded that the Court improperly adopted a bright-line rule in this circumstance for the sake of convenience.[81]

The United States Supreme Court's decision in *Minnick* represents a major step in the law protecting suspect's rights.[82] Prior to the instant case, the fourteenth amendment's due process clause forbade admissibility of coerced confessions on the ground that they were un-

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[76] *Id.* The suspect possessed the right to have counsel present at *all* police-initiated interrogations. *Id.*

[77] *Id.* at 491. The Court declined to make an exception on the ground that it supported the "clear and unequivocal character" of the *Edwards* rule. *Id.* at 492.

[78] *Minnick*, 111 S. Ct. at 493 (Scalia, J., dissenting). Scalia restated that the Court previously established a prophylactic rule founded upon a constitutional privilege against self-incrimination. *Id.* at 497 (Scalia, J., dissenting). The Constitution had not commanded the rule. *Id.* at 493 (Scalia, J., dissenting).

[79] *Id.* at 496 (Scalia, J., dissenting). The Court previously adopted the presumption that certain circumstances made the waiver involuntary. *Id.* (Scalia, J., dissenting). Scalia reasoned that this presumption should not be confused with the idea that no waiver at all was possible. *Id.* (Scalia, J., dissenting). In situations where a suspect previously consulted with counsel, Scalia concluded that the *Edwards* rule possessed no basis in fact. *Id.* (Scalia, J., dissenting).

[80] *Id.* (Scalia, J., dissenting). Scalia concluded that the Court should have limited the *Edwards* rule to situations where the suspect remained in a hostile environment or was ignorant of his constitutional rights. *Id.* (Scalia, J., dissenting).

[81] *Id.* at 497 (Scalia, J., dissenting). Scalia concluded by stating that the "extension of the *Edwards* prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement." *Id.* (Scalia, J., dissenting). Furthermore, the Court's recent precedents were not a valid excuse for this "incursion upon state practices." *Id.* at 494 (Scalia, J., dissenting).

[82] *See supra* note 8 and accompanying text.

trustworthy or involuntary.[83] Under this rule, the courts examined the "totality of the circumstances" surrounding a confession on a case-by-case basis.[84] Since the decision in *Malloy*, the Court has properly recognized that the fifth amendment right against self-incrimination needs procedural protection in order to survive the pressures of custodial interrogation.[85] *Edwards* attempted to further the underlying goals in *Miranda* and to counteract the inherently compelling pressures present in custodial interrogation by establishing a per se prophylactic rule.[86] This rule prohibited any further interrogation until counsel had been "made available" to the suspect.[87] The Court's difficulty in defining the language put forth by the *Edwards* Court prompted the extension of the bright-line rule to include all custodial interrogation.[88] The instant case represented a conflict between two fundamental interests in society—the interest in prompt and efficient law enforcement and the interest in preventing rights of individual society members from being abridged by unconstitutional methods of law enforcement.[89] Leaving the legality of interrogation procedures following invocation of a right to counsel to be determined on a case-by-case basis would create an overwhelming burden on law enforcement officials and court officials alike.[90] However, the Court expanded the harsh prophylactic rule beyond what was necessary to protect a suspect's fifth amendment rights.[91] Therefore, law enforcement efforts to obtain voluntary confessions are unnecessarily hindered.[92]

Melissa Frugé

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[83] *See supra* notes 9, 10, 19 and accompanying text.
[84] *See supra* note 23 and accompanying text.
[85] *See supra* notes 32, 41, 51, 56 and accompanying text.
[86] *See supra* notes 63, 68, 69 and accompanying text.
[87] *See supra* note 64 and accompanying text.
[88] *See supra* notes 8, 54 and accompanying text.
[89] *See supra* note 69 and accompanying text.
[90] *See supra* note 69 and accompanying text.
[91] *See supra* note 79 and accompanying text.
[92] *See supra* notes 80, 81 and accompanying text.

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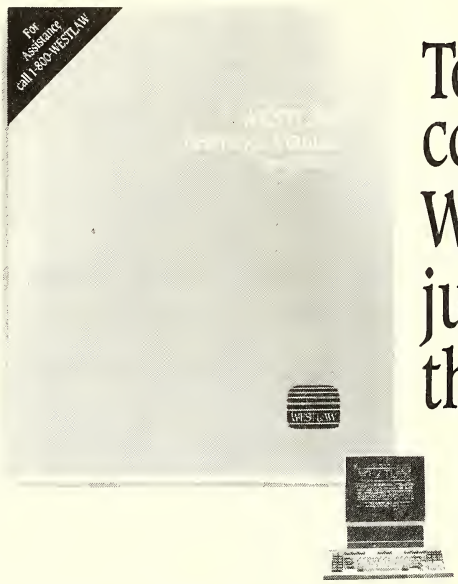

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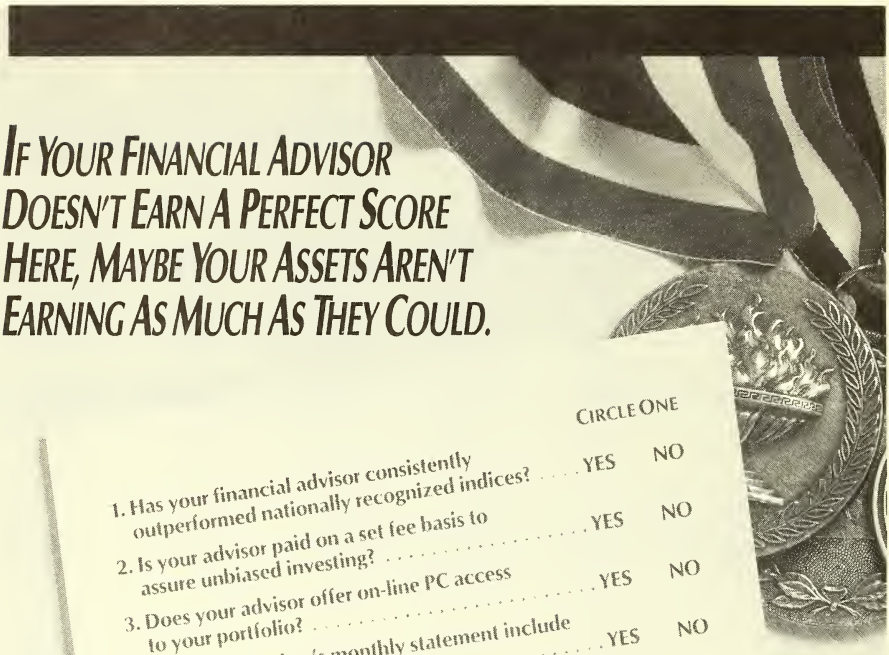

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